(1) Supreme Court, U.S.
FILED

No. 05-336 SEP 12 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES R. TURCOTTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JAMES F. HURST
DEREK J. SARAFA *
SHELBEE L. JAROL
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601

* Counsel of Record

Counsel for Petitioner James R. Turcotte

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Under the Controlled Substance Analogue Act, whether the complete failure to instruct the jury that the offense requires the defendant to be aware that the substance is an analogue of a controlled substance, an element of the offense, can constitute harmless error, even though the element was vigorously contested at trial.

2. Whether, instead of allowing the jury to decide whether the defendant knew that the substance was an analogue of a controlled substance (as required by the Act), the court's application of a conclusive and irrebuttable presumption that the defendant possessed such knowledge, based upon the existence of Congressional pronouncements to that effect, equates to a directed verdict of that element of the offense, in violation of the Fifth and Sixth Amendments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE SEVENTH CIRCUIT'S DECISION THAT OMISSION OF A CONTESTED ELEMENT OF AN OFFENSE CAN BE HARMLESS CONFLICTS WITH THE LAW OF AT LEAST THREE OTHER CIRCUITS	6
A. *Dicta* In *Neder* Indicated That The Harmless Error Rule Cannot Apply When A Contested Element Of The Offense Is Omitted From The Jury Instructions	8
B. The Ninth, First And Fourth Circuits Have Followed *Neder*	9
C. The Seventh Circuit Created A Split By Ruling That The Omission Of A Contested Element Can Constitute Harmless Error	12
II. THE SEVENTH CIRCUIT'S APPLICATION OF A CONCLUSIVE PRESUMPTION AS TO WHETHER MR. TURCOTTE HAD KNOWLEDGE THE SUBSTANCE WAS AN ANALOGUE VIOLATED HIS RIGHT TO A JURY TRIAL ON THAT ELEMENT	15
CONCLUSION	19

TABLE OF CONTENTS—Continued

Page

APPENDIX A, April 19, 2005 Published Opinion of the United States Court of Appeals for the Seventh Circuit Affirming July 2, 2003 Decision of the United States District Court for the Northern District of Illinois 1a-36a

APPENDIX B, June 14, 2005 Amended Order Denying Petition for Rehearing *En Banc* Filed May 27, 2005 ..... 37a-38a

APPENDIX C, July 2, 2003 Decision of the United States District Court for the Northern District of Illinois Denying Petitioner's Motions for a Judgment of Acquittal or Alternatively, a New Trial 39a-45a

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Carella v. California, 491 U.S. 263 (1989)	16, 17
Chapman v. California, 386 U.S. 18 (1967)	8, 18
Connecticut v. Johnson, 460 U.S. 73 (1983)	*passim*
Dretke v. Haley, 541 U.S. 386 (2004)	15
Johnson v. United States, 520 U.S. 461 (1983)	14
Neder v. United States, 527 U.S. 1 (1999)	*passim*
Powell v. Galaza, 328 F.3d 358 (9th Cir. 2003)	*passim*
Richardson v. United States, 526 U.S. 813 (1999)	11
Rogers v. United States, 522 U.S. 252 (1998)	14
Sandstrom v. Montana, 442 U.S. 510 (1979)	15
Standefer v. United States, 447 U.S. 10 (1980)	15
United States v. Brown, 202 F.3d 691 (4th Cir. 2000)	*passim*
United States v. Gaudin, 515 U.S. 506 (1995)	15
United States v. Prigmore, 243 F.3d 1 (1st Cir. 2001)	*passim*
United States v. Turcotte, 405 F.3d 515 (7th Cir. 2005)	1, 7

FEDERAL STATUTES AND AMENDMENTS

28 U.S.C. § 1254	2
21 U.S.C. § 802	3, 12
U.S. CONST. amend. V	2
U.S. CONST. amend. VI.	3

PETITION FOR A WRIT OF CERTIORARI

Mr. Turcotte respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. Certiorari is appropriate because the panel's decision conflicts with decisions of at least three sister circuits, s*ee Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003), *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), and *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000), which held that the omission from jury instructions of a genuinely contested element of an offense cannot be harmless, which is a principle supported by *dicta* in *Neder v. United States*, 527 U.S. 1 (1999). The Seventh Circuit created a discernable split in the Circuits by ruling that the district court's instruction for the jury to "forego" considering Mr. Turcotte's knowledge relating to whether the substance was an analogue was harmless, even though the facts relating to that element were vigorously contested at trial.

In addition, this case raises an important question of federal law relating to a defendant's due process rights and right to a jury trial under the Fifth and Sixth Amendments. Specifically, the Seventh Circuit's application of a conclusive presumption to satisfy an element of the offense—whether the defendant knew that the substance he possessed was a controlled substance analogue—without requiring the Government to prove that element beyond a reasonable doubt, implicates due process rights and the right to have a jury decide each contested element of the offense.

OPINION BELOW

The opinion of the court of appeals below was published and is reported as *United States v. Turcotte*, 405 F.3d 515 (7th

Cir. 2005). The decision is reprinted in the attached Appendix. (App. 1a-36a).[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 19, 2005. On May 27, 2005, Mr. Turcotte timely filed a petition for rehearing *en banc*. The Seventh Circuit initially denied this request on June 8, 2005. Subsequently, on June 14, 2005, the court issued an amended order denying the request for a rehearing. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS AND STATUTES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V (2005).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commit-

---

[1] The record on appeal consists of: two volumes of pleadings, two volumes of transcripts, and one in camera envelope from the district court proceedings; one supplemental record containing seven volumes of transcripts; one supplemental record containing two in camera envelopes; one supplemental record containing one volume of pleadings and three boxes of exhibits; one supplemental record containing two volumes of transcripts; and one supplemental record containing one volume of pleadings.

ted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI (2005).

(A) Except as provided in subparagraph (C), the term "controlled substance analogue means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II. 21 U.S.C. § 802(32).

STATEMENT OF THE CASE

Mr. James Turcotte was charged with violating the Controlled Substance Analogue Act, 21 U.S.C. § 802. The government alleged that Mr. Turcotte distributed gamma butyrolactone ("GBL") and 1,4-butanediol ("BD"), which it claimed were controlled substance analogues of the federally regulated substance gamma hydroxybutyric acid ("GHB").

As with any controlled substance, the government must prove that the defendant intended to possess and/or distribute the substance. (App. at 14a). But when dealing with sub-

stances under the Controlled Substance Analogue Act, which are not *per se* illegal, however, "knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance." (App. at 15a). Thus, under the statute, before Mr. Turcotte could be convicted, the government had to prove beyond a reasonable doubt (and the jury had to decide) that the substance was a controlled substance analogue, *and that Mr. Turcotte was aware of that fact.* (App. at 18a).

At trial, Mr. Turcotte vigorously contested the issue of knowledge. He presented an array of evidence indicating he did not know that GBL was an analogue of GHB, including his own sworn testimony (Tr. 1396-99, 1407, 1413, 1421, 1444-45, 1449-51, 1459-60, 1470), testimony showing that when he first became aware of the products, they were sold openly in the marketplace (over the counter at a nutritional store, where most of the transactions were carried out by credit card), (Tr. 1384-85, 1393-94, 1413, 1420), testimony from experts that the substances were not, in fact, analogues of one another, (Tr. 1120-21, 1203) ("Q: Are they [BD and GHB] substantially similar? A: No. They are substantially dissimilar. When they are similar, things that are similar are in the same group; things that are dissimilar are in different groups. Q: How about GHB to GBL, same question. A: Same answer. Q: Are they substantially similar? A: No, they are substantially different . . . Q: You don't have an opinion whether GBL is an analogue of GHB? THE COURT: A chemical analogue. A: No, chemical analogues, they are not"), and testimony from prosecution witness Special Agent Ken Kulick, who testified that he did not think Mr. Turcotte was specifically "aware" that GBL was a controlled substance (Tr. 935-36) ("Q: And a lot of people were not aware of what the product was, including Jim [Turcotte], isn't that correct? A: Yes."). The Government, for its part, presented evidence that it believed demonstrated that Mr.

Turcotte was aware that the substance was an analogue of a controlled substance.

But the jury never reached the issue because it was not instructed on it. Over Mr. Turcotte's objection, the district court instructed the jury *not* to consider whether Mr. Turcotte had the requisite knowledge. Instead, the jury was instructed: "[I]t does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL." (R. Doc. 105).

On appeal, the Seventh Circuit called this instruction on "scienter" "incomplete" and "highly misleading," and ultimately held that the instruction was given in error. (App. at 20a). The court's opinion confirmed that a conviction for controlled substance analogues requires that a defendant know that the substance was a controlled substance analogue; that is, he "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he must either know that it has similar physiological effects or intend or represent that it has such effects." (App. at 18a).

The Seventh Circuit recognized that "well-established jurisprudence regarding the scienter requirements of controlled substance violations require that juries confront these questions of knowledge squarely." (App. at 19a). The court candidly admitted that in this case, "the jury did not confront this question directly below." (App. at 20a). In fact, "*the jury was specifically instructed to forego this determination*." (App. at 20a) (emphasis added). Because the jury never passed judgment on a contested element of the crime, the Seventh Circuit stated that this would "ordinarily . . . amount to reversible error," giving a jury the opportunity to address the knowledge issue. (App. at 20a).

Instead of reversing the conviction, however, the court determined the error was harmless. This conclusion was not

based, and could not be based, upon the Seventh Circuit's independent review of the evidence—because the record included an abundance of evidence that Mr. Turcotte *did not know* that the substance was an analogue, the court could not have found the instruction harmless. So instead of allowing the jury to weigh this evidence, the court effectively directed a verdict against Mr. Turcotte, at least on the intent element of the crime, by finding that Congressional pronouncements regarding GBL put Mr. Turcotte "on notice" of the illegality of the substance. There was no evidence that Mr. Turcotte had ever seen, read or heard of these pronouncements, and Mr. Turcotte testified he was unaware of the illegality of the substance.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION THAT OMISSION OF A CONTESTED ELEMENT OF AN OFFENSE CAN BE HARMLESS CONFLICTS WITH THE LAW OF AT LEAST THREE OTHER CIRCUITS.

The Seventh Circuit found that the omission from jury instructions of a contested element of the offense constituted harmless error. There is no question, as the Seventh Circuit acknowledged, that the Controlled Substance Analogue Act requires "a showing that the defendant knew the substance in question was a controlled substance analogue," and that the district court—with "incomplete" and "highly misleading" jury instructions—instructed the jury to "forego" making that determination. (App. at 18a, 20a). The Seventh Circuit found this error to be harmless. (App. at 20a).

The decision contradicts opinions of this Court and the law of at least three sister circuits. In *Neder v. United States*, this Court observed that "if," based upon an erroneous instruction, "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—

for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." 527 U.S. at 19 (1999). The Ninth, First and Fourth Circuits have all followed *Neder* in ruling that where there was contested evidence regarding the omitted element, the failure to instruct on that element cannot be harmless. *See Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003); *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001); *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000).

The Seventh Circuit contradicted this authority and applied harmless error analysis, even though Mr. Turcotte presented significant evidence indicating he was unaware the substance was an analogue. Ignoring all of the record evidence regarding Mr. Turcotte's knowledge and intent, the Seventh Circuit found that the district court's error was harmless because Congressional "pronouncements are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue." (App. at 21a). The panel cited no evidence that Mr. Turcotte was actually aware of these pronouncements (he was not), and failed to cite any evidence that it had the power to impose this irrebuttable presumption against Mr. Turcotte regarding the state of his knowledge. The court simply paid no attention to the fact that Mr. Turcotte vigorously contested this element of the offense.

The ruling created a split among the circuits. On the one hand, the *dicta* in *Neder*, and the decisions in *Powell*, *Prigmore* and *Brown*, all found that the omission of a contested element of an offense from the jury instructions cannot constitute harmless error. The Seventh Circuit has now held exactly to the contrary—according to the ruling in *Turcotte*, the omission of a contested element of an offense from the instructions (in this case intent) can constitute harmless error. The Court should resolve this split among the circuits.

A. *Dicta* In *Neder* Indicated That The Harmless Error Rule Cannot Apply When A Contested Element Of The Offense Is Omitted From The Jury Instructions.

In *Neder v. United States*, this Court addressed the issue of erroneous jury instructions regarding a single element of an offense. 527 U.S. 1 (1999). The defendant had been convicted of a number of offenses, including tax fraud, mail fraud, wire fraud, and bank fraud. The court failed to instruct the jury on the element of materiality, which was required to convict on each of the alleged offenses. This Court held that the question was not whether a jury instruction that omits an element of the offense was error, because clearly it was; the question was whether that error was subject to harmless error analysis. *Neder*, 527 U.S. at 12.

The Court found that the error was subject to harmless error analysis. The Court applied the *Chapman* test for harmless error, namely, "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15 (*citing Chapman v. California*, 386 U.S. 18, 24 (1967)). The Court found that the element of materiality was supported by overwhelming evidence in the record—so overwhelming, in fact, that the defendant did not even contest the materiality of his false statements. Accordingly, the jury verdict would have been the same even if the instruction had been proper.

The Court stressed no less than three times that where "a defendant did not, and apparently could not, bring forth facts contesting the omitted element," the erroneous instruction is properly found to be harmless because there is no way it contributed to the verdict obtained. *Neder*, 527 U.S. at 19. *Neder*, however, noted an important limitation—the harmless error rule should not apply when the defendant contested the omitted element. The Court concluded that if, at the end of thorough examination, "the court cannot conclude beyond a

reasonable doubt that the jury verdict would have been the same absent the error—*for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding*—it should not find the error harmless." *Id.* (emphasis added).

B. The Ninth, First And Fourth Circuits Have Followed *Neder*.

At least three circuits, the Ninth, First and Fourth, have addressed this issue in the post-*Neder* era, and each of them arrived at the same conclusion: an instruction that omits a *contested* element of a criminal offense cannot be harmless. *See Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003); *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001); *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000).

In *Powell*, the trial court instructed the jury in the midst of the trial for failure to appear at a sentencing hearing that the inmate's own testimony satisfied the specific intent element of the crime. *Powell*, 328 F.3d at 561. The court found that the "trial court's instruction improperly removed the element of specific intent to evade the court process—the only contested issue—from the jury's consideration and in effect commanded a directed verdict for the state." *Id.* at 563. The court found that the instruction was in error.

But this error was not susceptible to harmless error analysis. Citing *Neder*, the court stated that "[a]n instruction that the only *contested* element has been satisfied cannot be reviewed for harmless error because the wrong entity—the judge rather than the jury—is responsible for rendering the verdict." *Id.* at 566 (emphasis added).[2]

---

[2] Whether the failure related to the "only" contested element or one of many is irrelevant because the government must prove *each* element of the offense beyond a reasonable doubt, i.e., the removal of one of many contested elements from the hands of the jury is sufficient to render the trial defective.

A similar result obtained in *Prigmore*. There, the defendants were convicted of conspiring to defraud and impair the functioning of the FDA in connection with its oversight and regulation of medical devices. One of the central issues was whether the defendants were required to make certain regulatory filings because they modified their heart catheter product in a manner that affected the safety and efficacy of the device during its "intended conditions of use." *Id.* at 14. The government presented ample evidence that the defendants conducted testing "for the purposes of evaluating safety and/or efficacy during intended conditions of use[.]" *Id.* at 22. But the defendants contested this evidence by claiming that the testing was to determine whether the modifications ameliorated safety concerns during "*unintended* conditions of use," thus not requiring the filings. *Id.* (emphasis added).

Like this case, the instruction at issue related to the defendants' intent. The question was whether the district court erred in refusing to instruct the jury that the defendants' asserted understanding of when a change should be regarded as "affecting the safety or effectiveness" of a medical device under the relevant statute "was at least reasonable and therefore the measure against which defendants' criminal culpability should be assessed." *Id.* at 17.

The court reviewed the competing evidence to determine if the element was genuinely contested:

> Unlike *Neder*, the government's evidence as to the purpose of the testing was contested by defendants; as we have stated, defendants introduced testimonial evidence that the purposes of this testing were to determine whether the modifications were ameliorating safety concerns during unintended conditions of use and/or to establish consumer preferences within the meaning of 21 C.F.R. § 812(c)(4). *See* supra at 13-14. Given Neder's repeated emphasis on the "uncontested" nature of the

> evidence of materiality in that case, *see* 527 U.S. at 15, 17, 17 n.2, & 19, the contested nature of the testing evidence in this case might well suffice to distinguish it from *Neder* in and of itself.

Prigmore, 243 F.3d at 22. The court ultimately found that while the government's evidence was "strong," the defendant's "was not inherently incredible." *Id.* That "effectively end[ed] the matter" because as an appellate court the panel was "not equipped to make credibility determinations that must be made in choosing between these clashing blocs of evidence, each of which is sufficient to render rational a finding in favor of its proponent." *Id.*

Finally, the Fourth Circuit held that harmless error analysis is unavailable under these circumstances in *United States v. Brown*. In *Brown*, the defendant was convicted of, *inter alia*, engaging in a continuing criminal enterprise. *Brown*, 202 F.3d at 694. The district court failed to instruct the jury that, prior to rendering a guilty verdict, unanimity was required on the specific predicate offenses constituting the "continuing series" and that the defendant himself committed these offenses. *Id.* at 698. After trial, but before the appeal, the issue was resolved in *Richardson v. United States*, 526 U.S. 813 (1999), which held that the instruction was required. The question left for the Fourth Circuit was whether the error was subject to harmless error analysis.

The court framed the issue based upon the language in *Neder*. "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence . . . the erroneous instruction is properly found to be harmless." *Id.* at 700 (*quoting Neder*, 527 U.S. at 17) (ellipses added). But "if the defendant contested the omitted element, *Neder* mandates a second inquiry. In that event, we must determine whether the 'record contains evidence that could rationally lead to a

contrary finding with respect to that omitted element.'" *Id.* at 701 (*quoting Neder*, 527 U.S. at 19). That is, the court must determine whether the element is *genuinely* contested—it is not enough for the defendant to merely contest the element, but, rather, the record must contain sufficient evidence to support a contrary finding on that element.

The court reviewed the relevant evidence to determine whether the defendant genuinely contested the "continuing series" element. The Government presented the testimony of several witnesses regarding several predicate offenses relating to the purchase of narcotics, but the defendant elicited substantial testimony calling the credibility of these witnesses into question and contradicting the Government's proofs. *Id.* at 702. Thus, the defendant "*genuinely* contested the evidence supporting each of the alleged predicate offenses, and there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the Government's witnesses." *Id.* (emphasis added). Accordingly, the court was unable to conclude that the error was harmless.

C. The Seventh Circuit Created A Split By Ruling That The Omission Of A Contested Element Can Constitute Harmless Error.

The Seventh Circuit created a split of authority by ruling that the omission of a contested element of an offense can constitute harmless error. Under the Controlled Substance Analogue Act, a defendant "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he must either know that it has similar physiological effects or intend or represent that it has such effects." (App. at 18a; *see also*, 21 U.S.C. § 802(32)(A)). In other words, before Mr. Turcotte could be convicted, the government had to prove beyond a reasonable doubt (and the jury had to decide) that the substance was a controlled

substance analogue, *and that Mr. Turcotte was aware of that fact.* (App. at 18a).

There is simply no question—as the Seventh Circuit repeatedly admitted—that the district court omitted this element from the jury instructions. Not only did the district court omit this element, but, as the Seventh Circuit noted, "*the jury was specifically instructed to forego [the] determination*" of whether Mr. Turcotte possessed the requisite knowledge or intent. (App. at 20a) (emphasis added). Specifically, the district court instructed the jury that "it does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL." (R. Doc. 105). The Seventh Circuit called this instruction on "scienter" "incomplete" and "highly misleading," and ultimately held that the instruction was given in error. (App. at 20a).

But the court went on to apply the harmless error analysis, even though the omitted element was obviously contested at trial. Mr. Turcotte vigorously contested that he was aware that the substance he possessed was an analogue of a controlled substance. This contention was supported by an array of evidence, including Mr. Turcotte's own sworn testimony that he was not aware the substances were analogues of controlled substances, testimony showing that when Mr. Turcotte first became aware of the products, they were sold openly in the marketplace (over the counter at a nutritional store), testimony from experts that the substances were not, in fact, analogues, and testimony from a prosecution witness (and government agent) that he did not think Mr. Turcotte was specifically "aware" that GBL was a controlled substance. *See* supra at 4. The Government, of course, contended that Mr. Turcotte was aware that the substance was an analogue of a controlled substance. So, there is no dispute that this issue was contested at trial—but the Seventh Circuit ultimately concluded that the omission of this contested

element of the offense from the jury instructions was subject to harmless error review.

The decision flies in the face of *Neder*. The principle stated in *Neder* is that an error cannot be harmless "where the defendant contested the omitted element and raised sufficient evidence to support a contrary finding" because under those circumstances "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error[.]" 527 U.S. at 19. *See also*, *Rogers v. United States*, 522 U.S. 252 (1998) (ruling the error was harmless because the defendant admitted to the element at trial); *Johnson v. United States*, 520 U.S. 461 (1997) (holding the error was harmless; there was overwhelming evidence of materiality which was essentially uncontroverted at trial, and no reasonable juror could conclude Johnson's statements were not material).

Here, not only did Mr. Turcotte contest the element, but the evidence he presented was sufficient "to support a contrary finding," i.e., that he did not know the substances were analogues. Had the jury, for example, credited Mr. Turcotte's sworn testimony, then they would have been duty-bound to acquit him. But since the jury was specifically instructed to "forego" making any determination regarding Mr. Turcotte's knowledge, such an outcome was impossible. As such, this error cannot be considered harmless.

In addition to contradicting *Neder*, the opinion creates a split among the circuits. The sister circuits reviewed the evidence to determine whether the element was genuinely contested, and then determined that since the element was contested, the error could not be harmless. Unlike the Ninth, First, and Fourth Circuits, the Seventh Circuit never reviewed the evidence on the element to determine whether it was contested, and instead summarily found that the error was "harmless." (App. at 20a). Although the facts are the same—namely that the jury was not allowed to deliberate on a hotly

contested element of the crime—the conclusions reached by the federal courts of appeal were very different. Thus, allowing the decision to stand would create a split between the Seventh Circuit and the Ninth, First, and Fourth Circuits.

II. THE SEVENTH CIRCUIT'S APPLICATION OF A CONCLUSIVE PRESUMPTION AS TO WHETHER MR. TURCOTTE HAD KNOWLEDGE THE SUBSTANCE WAS AN ANALOGUE VIOLATED HIS RIGHT TO A JURY TRIAL ON THAT ELEMENT.

The Seventh Circuit applied a conclusive presumption to satisfy an element of the offense, in contravention to Mr. Turcotte's right to a jury trial on each and every element. The government must prove, beyond a reasonable doubt, each element of the offense with which the defendant is charged. *See Dretke v. Haley*, 541 U.S. 386, 395 (2004); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). This right is protected both under the Due Process Clause of the Fifth Amendment, *see Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) and under the Sixth Amendment, s*ee Gaudin*, 515 U.S. at 509-10.

Here, before Mr. Turcotte could be convicted, the jury had to decide that the substance was a controlled substance analogue, *and that Mr. Turcotte was aware of that fact.* (App. at 18a). But the jury never decided that issue.

Instead, the Seventh Circuit applied a conclusive presumption with regards to this element of the offense. But "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue." *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) (plurality opinion). That a directed verdict in a criminal case is strictly prohibited is well beyond challenge. *See Standefer v. United States*, 447 U.S. 10, 22 (1980).

That is precisely what occurred here. The court found, "[a]s with other known controlled substances (including GHB), knowledge of the substance's specific identify *implies* knowledge of the substance's legal status." (App. at 22a) (emphasis added). The sole basis for this conclusion was that Congressional and regulatory pronouncements "are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue." (App. at 21a).[3] In short, even though this statute specifically requires knowledge that the substance was an analogue, *i.e.*, it is an element of the offense, the court simply "implied" knowledge of that element. The use of this conclusive presumption (or implication) equated to an impermissible directed verdict on this element of the offense—the court effectively ruled that the Government need not prove, and the jury need not decide, whether the defendant actually had knowledge of the illegality of the substance (even though it is specifically required by the Act).

The Seventh Circuit's reliance upon the pronouncements as conclusive evidence of knowledge subverts the principles of *Carella v. California*, 491 U.S. 263 (1989).[4] In *Carella*, the Supreme Court addressed whether jury instructions that man-

---

[3] The issue of fair notice has nothing to do with whether the Government proved, and jury decided, that Mr. Turcotte had knowledge that the substance he distributed was an analogue of a prohibited substance. Rather, the issue of fair notice pertains to the unrelated issue of whether the statute was unconstitutionally vague. (App. at 16a-17a). In any event, the court's statement that the various pronouncements provided sufficient notice is simply untrue. One of the very DEA regulations the court cited merely states that GBL, "*under certain circumstances*", "*may* satisfy the definition of a controlled substance analogue." (App. at 21a) (emphasis added). This proves the point entirely—the substances are not specifically and unequivocally criminalized in and of themselves, but, rather, only once (in any given trial), the substance is proven to be an analogue.

[4] Based upon the Court's citation to *Carella* (and *Connecticut v. Johnson*, 460 U.S. 73 (1983), discussed below) in *Neder*, *see* 527 U.S. at 10, 12, 18, 25, it appears that both cases are still good law.

date presumptions as to elements of a crime are unconstitutional. In that case, the defendant was convicted of grand theft for failure to return a rented car. The jury was given two instructions that were phrased as commands, directing them to presume certain elements of the crime. *Carella*, 491 U.S. at 265-66.

The Court never reached the issue, because it ruled in the defendant's favor based on the mandatory jury instructions violating the Due Process Clause of the Fourteenth Amendment. *Id.* at 266. However, the Court stated that "[t]hese mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses . . . The instructions also relieved the State of its burden of . . . proving by evidence every essential element of [defendant's] crime beyond a reasonable doubt." *Id.* In order for a jury to find a defendant guilty of all elements of a crime beyond a reasonable doubt, those elements must properly be put before them; this cannot happen when the jury is instructed to presume malice from predicate facts.

The same shortcoming exists here. The district court specifically told the jury that "it did not matter" whether Mr. Turcotte had the requisite intent. And the court's ruling has now relieved the Government of proving—and the jury from finding—the knowledge element beyond a reasonable doubt. Indeed, assuming the court's view of the law is correct, there would be no need to give the knowledge instruction in the future because, as it ruled, Congressional pronouncements definitively settle the issue of the defendant's knowledge. "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella*, 491 U.S. at 265.

This conclusion is further supported by *Connecticut v. Johnson*, 460 U.S. 73 (1983). In that case, the defendant was convicted of attempted murder, kidnapping, robbery, and

sexual assault. When instructing the jury on two of the charges (which were later reversed by the appellate court), the district court directed that "every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 78.

A plurality of the Court determined that the instruction applied an erroneous presumption to the issue of intent. The plurality explained:

> An erroneous presumption on a disputed element of a crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

Id. at 85-86.

The presumption that the jury was instructed to apply in *Johnson* permitted them to convict the defendant without examining the evidence concerning the intent element of the crime charged. *Id.* at 87-88. Ultimately, the plurality found that such a presumption "deprived [the defendant] of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Johnson*, 460 U.S. at 88 (*citing Chapman*, 386 U.S. at 23).

The court's decision directly contradicts *Johnson*. Here, there is no dispute that the jury "failed to consider evidence of intent"—as the Seventh Circuit acknowledged, the district court specifically instructed the jury to "forego" that determination. (App. at 20a). Given that failure, the panel "cannot hold that the error did not contribute to the verdict." *Johnson*, 460 U.S. at 86. The court's view of the evidence

of intent—here Congressional pronouncements—is "simply irrelevant." *Id.*

This Court needs no reminding of what is at stake here. As the Court eloquently stated in *Johnson*, "To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made." *Id.* Allowing the Seventh Circuit's decision to stand will wildly sway the balance in favor of society's interest in punishing the guilty and against the strong interest we have in seeing that these decisions are actually made by a jury of the defendant's peers.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JAMES F. HURST
DEREK J. SARAFA *
SHELBEE L. JAROL
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601

* Counsel of Record

Counsel for Petitioner
James R. Turcotte

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-2988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES R. TURCOTTE,
Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 00 CR 737-2—James B. Moran, *Judge.*

ARGUED NOVEMBER 1, 2004—DECIDED APRIL 19, 2005

Before CUDAHY, ROVNER and WOOD, *Circuit Judges*.

CUDAHY, *Circuit Judge.* Appellant James Turcotte was convicted of three counts of violating the Controlled Substances Act, including a conviction for possession and distribution of a controlled substance analogue as defined by 21 U.S.C. § 802(32). Turcotte now appeals his conviction before this Court, alleging that (1) the district court issued at least two erroneous and prejudicial jury instructions relating to the Analogue Provision of the Controlled Substances Act, (2) the prosecution improperly withheld *Brady* material at trial, (3) his conviction was precluded by existing federal law, (4) the Analogue Provision of the Controlled Substances Act is unconstitutionally vague and (5) the district court made several errors in trial management. We now affirm.

I. BACKGROUND

In this case we confront Congress's attempt to adapt the nation's controlled substances laws to the dizzying pace of innovations in drug technology. This case also marks the most recent chapter in one man's ill-fated personal and professional odyssey from bricklayer to bodybuilder to drug merchant. James Turcotte worked as a bricklayer throughout most of the 1990s. In late 1998 or early 1999, Turcotte was contacted by Brian Gore and asked to do some construction work at Max Muscle, a store selling vitamins, supplements, sports apparel and weightlifting equipment in a shopping mall in Downers Grove, Illinois. Max Muscle had been recently opened by Gore's friend Scott Wright. In September, 1999, Turcotte participated in a bodybuilding contest sponsored by Max Muscle, which required contestants to use Max Muscle products while preparing for the competition. In conjunction with this competition, Turcotte purchased nutritional supplements from Max Muscle, including "Verve 5.0," a purported vitamin supplement that contains the chemicals GHB, GBL and BD.[1]

Sometime in March 2000, Gore sold Best Buy Supplements, an internet-based company through which Turcotte was to sell Verve 5.0, to Turcotte. Best Buy Supplements conducted its business through the websites *bestbuy supplements.com* and *growthhormoneshop.com*, offering a variety of bodybuilding and fitness products including Verve 5.0 and other "Growth Hormone Products." The *bestbuysupplements.com* website, which listed Turcotte as its "owner," touted Verve 5.0 as the "absolute finest quality GHB precursor" and acknowledged that both "furanone"—

---

[1] "GHB" is Gamma Hydroxybutyric Acid, a Schedule I Controlled Substance under federal regulations. Gamma Butyrolacetone ("GBL") and 1,4-butanediol ("BD") are substances that convert to GHB in the human body.

another name for GBL—and "butanediol" (BD) are "illegal nationwide." To fulfill customer orders, Turcotte purchased cases of Verve labeled "cleaning supplies."

In August of 2000, the Drug Enforcement Administration (DEA) began an undercover investigation of Turcotte's sales of Verve after arresting Kevin Masquida, who had purchased Verve online from Best Buy Supplements. Masquida entered into a plea agreement with the government under which he agreed to help the DEA arrange an undercover purchase of Verve from Turcotte. After a series of phone calls from Masquida, the purchase was scheduled for 5:00 p.m. on September 8, 2000, at a Shell gas station in Mokena, Illinois. Masquida agreed to buy twenty cases of Verve for $10,000.

On the day of the transaction, undercover DEA agent Robert Coleman accompanied Masquida, posing as an individual interested in purchasing Verve. The entire transaction was monitored by DEA surveillance. Turcotte and Gore met Masquida and Coleman at the Shell station as planned, and they drove to a nearby Wendy's parking lot where Turcotte had parked his van. Coleman handed Turcotte a styrofoam cup containing $10,000 in cash, and Turcotte directed the group to transfer 20 cases of Verve from Turcotte's van to Masquida's van. When the transfer began and Coleman was able to confirm that the cases did contain Verve, DEA agents arrived to arrest Turcotte and Gore.

Turcotte was charged in three counts of a five-count indictment. *Count One* charged Turcotte with knowingly and intentionally conspiring to defraud and mislead the government by introducing misbranded drugs (GHB, GBL and BD) into interstate commerce. *Count Two* charged Turcotte with conspiring to possess and distribute GHB (a Schedule I Controlled Substance), GBL (a schedule I controlled substance analogue under 21 U.S.C. § 802(32)), and BD (a schedule I controlled substance analogue under § 802(32)) in violation of The Controlled Substances Act (CSA or "the

Act"), 21 U.S.C. §§ 841(a)(1) and 813. *Count Five* charged Turcotte with knowingly and intentionally possessing with intent to distribute 60 gallons of GHB and GBL in violation of §§ 841(a)(1) and 813 of the CSA. As to GBL and BD, these charges come under the Analogue Provision of the Controlled Substances Act, 21 U.S.C. § 802(32), which provides that substances satisfying the definition of a "controlled substance analogue" may be regulated as controlled substances even though they are not formally classified as such under federal law.

On November 12, 2000, Turcotte proceeded to trial. Government witnesses included Agent Coleman, Masquida, officials from the Food and Drug Administration (FDA), a forensic drug chemist from the DEA, toxicology and medical experts, registered distributors of GBL and other law enforcement and fact witnesses who testified about the physiological effects of GBL. During the trial, the government claims it suddenly became aware of Investigational New Drug Reports (INDs) which detailed research into potential medical uses for GHB, including a treatment for narcolepsy involving a new drug named Xyrem. Turcotte immediately requested copies of the INDs. The district court, while opining that the INDs would probably prove to be of little use to the defense, provided that the government's witnesses would remain available for recall after presentation of the government's case-in-chief so that Turcotte could cross-examine them further about the content of the new INDs. In his defense, Turcotte testified personally and also called his own forensic chemistry and medical experts to testify. Turcotte admitted that he knew Verve was a chemical solvent and that he had sold it for human consumption.

At the conclusion of the trial, the district court issued its instructions to the jury. Two of them are at issue here. First, with regard to the definition of a controlled substance analogue, the district court instructed the jury that the three

clauses of the CSA's Analogue Provision, 21 U.S.C. § 802(32), should be read in the disjunctive rather than the conjunctive. After acknowledging that the Seventh Circuit had not yet endorsed either reading of the provision, the court gave the jury special verdict forms on which they could rule specifically on each of the Analogue Provision's three clauses. The court explained that it would temporarily defer ruling on the proper reading of the Act but would revisit the issue if the special jury forms revealed that the different readings of the provision—conjunctive versus disjunctive—would have produced different results. Second, with regard to Count Five, the district court instructed the jury on the scienter requirement of the CSA'a analogue provision, telling jury members they could convict Turcotte even if they did not find that he knew GBL was a "controlled substance."

On November 22, 2003, the jury convicted Turcotte on all counts, returning special verdict forms finding that GBL met all three criteria listed in the CSA's Analogue Provision, 21 U.S.C. § 802(32), but that BD met only one of these criteria. On January 22, 2004, Turcotte timely filed a motion for a judgment of acquittal or a new trial. He claimed that (1) the district court's jury instruction mandating a disjunctive reading of the CSA'a Analogue Provision was error, (2) the court's jury instructions regarding the Analogue Provision's scienter requirement was erroneous, (3) the prosecution improperly withheld *Brady* materials (the new INDs) and (4) the Analogue Provision of the CSA is unconstitutionally vague. Turcotte later filed an untimely motion further alleging (1) that GBL and BD are not controlled substance analogues of GHB because GHB is no longer a Schedule I Controlled Substance, and (2) that the Dietary Supplements Health & Education Act (DSHEA) prevents BD and GBL from being classified as controlled substance analogues.

The district court considered all of Turcotte's claims—timely and untimely alike—and denied his post-trial motions for an acquittal or a new trial in a memorandum disposition

dated July 7, 2003. *United States v. Turcotte*, 286 F. Supp. 2d 947 (N.D. Ill. 2003). Turcotte was sentenced to 54 months' imprisonment for each of the three counts (to run concurrently), three years' supervised release and a fine. Turcotte now appeals the district court's denial of his post-trial motions and asks that his conviction be reversed, or, in the alternative, that the case be remanded for resentencing.

II. JURISDICTION

Since Turcotte was charged with a violation of the federal Controlled Substances Act (21 U.S.C. §§ 841(a)(1) and 846), the district court had jurisdiction pursuant to 18 U.S.C. § 3231, which provides for district court jurisdiction over "all offenses against the laws of the United States." The jury returned a guilty verdict against Turcotte on November 22, 2002, and the district court entered judgment on July 22, 2003. Turcotte timely filed his Notice of Appeal on July 23, 2003, and this Court now has jurisdiction to review the final order of the district court pursuant to 28 U.S.C. § 1291.

III. DISCUSSION

Turcotte advances six distinct claims in his challenge to the district court's ruling below. We address each of these claims in turn.

A. Conjunctive Versus Disjunctive Readings of the CSA's Analogue Provision

The particular constructional issue raised here is one of first impression for this Court. The CSA provides that certain substances, while not officially scheduled as controlled substances themselves, may be regulated as such if they meet the definition of a "controlled substance analogue." The CSA defines a "controlled substance analogue" as "a substance—"

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A) (2004).

As the old adage instructs, the devil is in the details—the relevant detail here being the single word "or" between clauses (ii) and (iii) of the definition. There are two possible readings of this definition. Under a disjunctive reading, a substance that satisfies *any one* of these three criteria qualifies as a controlled substance analogue. Under a conjunctive reading, the provision requires two things: (1) The substance in question must have a chemical structure substantially similar to a controlled substance (criterion one) and (2) it must *either* have a substantially similar effect on the central nervous system (criterion two) or be purported or intended to have such an effect (criterion three).

Both parties and the district court agree that the Seventh Circuit has yet to address this particular constructional issue. See 286 F. Supp. 2d at 951. It is also undisputed that the district court submitted a disjunctive instruction to the jury with the intention of revisiting the issue if the special verdict forms showed that the two interpretations would lead to different results. In its disposition of Turcotte's motion for a post-trial acquittal or a new trial, the district court stated that it was actually "inclined to agree" with Turcotte's arguments for

a conjunctive reading of the Act, but that "such a determination . . . does not affect defendant's conviction" since "[t]he jury's special verdict forms establish that the government proved all three elements of Section 802(32)(A) beyond a reasonable doubt with respect to GHB." *Id.* On appeal, the parties differ on the correctness of the district court's disjunctive instruction and its effect (or lack thereof) on Mr. Turcotte's conviction and sentencing. Turcotte contends that the district court's instruction was erroneous, and that it did indeed affect his ultimate sentence. This Court reviews de novo a district court's denial of a requested jury instruction. *United States v. Slater*, 348 F.3d 666 (7th Cir. 2003).

Unfortunately, the text of the Controlled Substances Act analogue provision is not a model of clarity. Common sense and the practical implications of various interpretive options ultimately offer more guidance than the text and structure of § 802(32)(A) itself. As a matter of strict textual analysis, § 802(32)(A) is susceptible to either a disjunctive or a conjunctive reading. The word "which" in the beginning of clauses (ii) and (iii) could be construed to refer either to "substance" in the preface of the definition (favoring a disjunctive reading) or to "chemical structure" in clause (i) (favoring a conjunctive reading). Yet the vast majority of federal courts to confront this issue have adopted the conjunctive reading. *United States v. Hodge*, 321 F.3d 429, 433 (3d Cir. 2003) (presenting in-depth analysis of the plain meaning and legislative history of § 802(32)(A)); *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003) (adopting the conjunctive reading); *United States v. Washam*, 312 F.3d 926, 930 n.2 (8th Cir. 2002) (adopting the conjunctive reading); *United States v. McKinney*, 79 F.3d 105, 107-08 (8th Cir. 1996), vacated on other grounds, 520 U.S. 1226 (1997) (presenting the test in the conjunctive without further elaboration); *United States v. Brown*, 279 F. Supp. 2d at 1240 (S.D. Ala. 2003) (adopting the conjunctive reading); *United States v. Vickery*, 199 F. Supp. 2d at 1371 (N.D. Ga. 2002)

(same); *United States v. Clifford*, 197 F. Supp. 2d at 519-20 (E.D. Va. 2002) (same); *United States v. Forbes*, 806 F. Supp. 232, 235 (D. Colo. 1992) (reviewing the Act's legislative history and asserting that the conjunctive reading is required to prevent absurd results). *See also United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004) (briefly surveying the relevant precedents and accepting the conjunctive reading). The only arguable exceptions are *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002), in which the Eleventh Circuit expressly declined to decide the issue, and *United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990), in which the Fifth Circuit recited the test in the disjunctive without discussion or elaboration.

The majority of these courts base their rulings largely on the absurd results that might obtain under a disjunctive reading, noting that alcohol and caffeine could be criminalized as controlled substance analogues based solely on the fact that, in concentrated form, they might have depressant or stimulant effects similar to illegal drugs. *See, e.g.*, *Forbes*, 806 F. Supp. at 235. Similarly, the sale of everyday substances could be criminalized if the seller merely represents that they are banned substances or have physiological effects similar to illegal drugs. *See id.* (Noting that under a disjunctive reading, the sale of powdered sugar could be criminalized if the seller represents that it is cocaine); *Hodge*, 321 F.3d 429 (rejecting a disjunctive approach and holding that selling a mixture of wax and flour is not criminalized merely because the seller represented it to be "crack cocaine").

Moreover, the legislative history of the Act suggests that such bizarre consequences were not intended by Congress. The Act was intended primarily to prevent scientists from slightly modifying the chemical structure of banned drugs to create new "designer drugs" that would have similar physiological effects but would not be covered by the law's controlled substances schedules. *See, e.g.*, *Hodge*, 321 F.3d

429 (conducting an extensive review of the Act's legislative history). According to one court, there is "not a scintilla of evidence" that "Congress intended to cover and criminalize sales of legal substances such as flour, salt, ginseng, vitamin B, etc., merely because the seller represents that they will yield a stimulant, depressant, or hallucinogenic effect like that of a controlled substance." *Clifford*, 197 F. Supp. 2d at 520-21. The court in *Clifford* also pointed out that Congress is capable of indicating an unambiguous disjunctive intent when it so desires: In at least one other provision of this very Act (§ 802(9)), a number of subordinate causes are listed in a fashion similar to § 802(32)(A), but each subsection is separated by the word "or" to indicate a clear disjunctive intent. *Id.* at 519-20.

Given that the text of the Act does not clearly demand either reading, we find the practical policy considerations identified by our sister courts compelling, especially when coupled with the Act's overall structure and legislative history. We therefore elect to heed the call of both accumulated precedent and common sense, joining the vast majority of federal courts in adopting the conjunctive reading of § 802(32)(A). Accordingly, the district court's disjunctive jury instruction was error. However, as will be discussed presently, this error was not ultimately prejudicial to Turcotte.

The parties' dispute over the import of the district court's disjunctive jury instruction seems to reflect fundamentally different readings of the jury's special verdict forms and the Presentence Investigation Report. Turcotte alleges that the jury found BD to be an analogue of GHB based on the fact that it satisfied only clause two of § 802(32)(A) (similar effect on the nervous system), and that therefore, since his conviction and sentence as to possession and distribution of BD was based on an erroneous disjunctive reading of the Act, he is entitled to relief in this Court.

The government responds by arguing that, since the jury found BD to satisfy only clause two of § 802(32)(A) (similar physiological effect), Mr. Turcotte was NOT convicted or sentenced for possession or distribution of BD at all. In effect, the government alleges that the jury and the probation officer preparing the Presentence Investigation Report (Appellant's Reply Br., Exh. 2.) read § 802(32)(A) conjunctively, notwithstanding the district court's disjunctive instruction. The government claims that Mr. Turcotte's sentence was based purely on his possession and distribution of GBL, which the jury found satisfied all three clauses of § 802(32)(A) (and thus would have qualified as an analogue of GHB under either a disjunctive or conjunctive reading of the Act).

The written record favors the government on this point. Turcotte's claims here seem to be moot. First, it is important to note that, by their own terms, Turcotte's arguments on this issue relate only to BD; both parties agree that the jury found GBL to meet all three clauses of § 802(32)(A), and thus that Mr. Turcotte would have been convicted for possession and distribution of GBL under either reading of the statute. As such, Turcotte's claims here only have traction if he was indeed convicted of possession with intent to distribute BD (as an analogue of GHB) and separately sentenced for this offense. The Presentencing Investigation Report reveals that Turcotte's conviction did not rest on his possession or distribution of BD, and it unequivocally states that his possession and distribution of BD did not affect calculation of his sentence. While the Report initially states that Mr. Turcotte was convicted of "conspiring with Brian Gore to possess with the intent to distribute, and possessing with the intent to distribute, GHB, GBL, and BD," it later makes clear that the jury did not find BD to be a controlled substance analogue and, accordingly, that Mr. Turcotte's possession of BD did not play any role in his conviction or sentencing:

> With specific regard to BD (1,4 Butanediol), the jury has returned a special verdict which states that BD is *not* a

> Schedule I Narcotic Drug Controlled Substance analogue, because BD's chemical structure is not significantly similar to the chemical structure of GHB. Thus the amounts of Flower Power (BD) and any other substances which contained BD *are not included in the amounts of controlled substances for which the defendant is accountable*, notwithstanding his possession and distribution of said substances.

Presentencing Investigation Report, Appellant's Reply Br., Exh. 2 at 20-21 (emphasis added). The Report then went on to state that even "[i]f the Court were to rule that BD is a controlled substance analogue of GBL, a Schedule I depressant, in contravention of the jury's special verdict, the number of units of BD involved in this case . . . *would not increase the base offense level applicable to this offense*." *Id.* (emphasis added).

No matter how one looks at it, BD simply does not appear to have been factored into Mr. Turcotte's sentencing. Thus the district court's disjunctive jury instruction, while erroneous, cannot be said to have prejudiced Turcotte. In fact, the district court seems to presage this ruling in its order denying Turcotte's post-trial motion for a judgment of acquittal or a new trial, stating that it was actually "inclined to agree" with Turcotte's arguments for a conjunctive reading of the Act, but that "such a determination . . . does not affect defendant's conviction." 286 F. Supp. 2d at 951. Given the prior absence of a clear ruling on the issue in this circuit, the district court's decision to have the jury rule separately on each element of the Analogue Provision appears an appropriate jurisprudential precaution. As such, we have no occasion to reverse the district court's ruling on this narrow constructional issue, though we hereby serve notice that courts in this circuit should henceforth apply a conjunctive reading of the CSA's Analogue Provision.

B. The District Court's Instructions on Scienter

Mr. Turcotte next alleges that the district court improperly instructed the jury that they could convict him under § 841(a) even if he did not know that GBL was an illegal controlled substance analogue. In proceedings below, the district court gave the following instruction:

> To sustain the charge in Court Five of possessing with intent to distribute mixtures containing a controlled substance, the government must prove the following propositions: First, the defendant knowingly and intentionally possessed mixtures containing GBL; Second, the defendant possessed mixtures containing GBL with the intent to deliver it to another person; and Third, that mixtures containing GBL are an analogue of GHB, a Schedule I Controlled Substance. *It does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL.*

(District Court Jury Instruction, ER 105 (emphasis added).) We review de novo a district court's denial of a requested jury instruction. *See Slater*, 348 F.3d 666.

The district court and the government argue for application of the time honored maxim that "ignorance of the law is no excuse." They contend that § 841(a) does not require knowledge that the substance in question is a controlled substance—a defendant must merely know the identity of the substance being possessed and distributed. *See* 286 F. Supp. 2d at 951. The district court expresses some doubt about this conclusion however, conceding "[p]erhaps that goes too far, as it might, possibly, in other circumstances, ensnare individuals engaged in apparently innocent conduct." *Id.* Nonetheless, the government and the district court stand firm, maintaining that even if knowledge of a substance's illegality is required under the Act, the special jury forms used in this

case resolve the issue, as they indicate the jury found that Turcotte "represented or intended" that GBL had physiological effects "substantially similar to or greater than" GHB, a controlled substance in Schedule I.

Such a position is extremely problematic, however, since the Analogue Provision imposes criminal liability through the more general provisions of the CSA, 18 U.S.C. § 841(a), which implicate a well-established scienter requirement. This Court has previously held—on multiple occasions—that as a prerequisite to liability for possessing a controlled substance with intent to distribute under § 841(a), defendants must know that the substance in question is a controlled substance. *United States v. Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002) ("Section 841(a) requires only that defendant know that he possesses a controlled substance; it does not require that he know the type of controlled substance he possesses."); *Lanier v. United States*, 220 F.3d 833, 840 (7th Cir. 2000) (requiring "knowledge that [the drug] is a controlled substance"); *U.S. v. Jones*, 248 F.3d 671, 675 (7th Cir. 2001) (citing Lanier for the same rule). In fact the Seventh Circuit Pattern Jury Instructions articulate the same standard: "It is sufficient that the defendant knew that the substance was some kind of prohibited drug. It does not matter whether the defendant knew the substance was [a specific drug]." STAR Modern Federal Jury Instructions—Criminal, § 7-202-03, 21 U.S.C. § 841(a)(1) (2004).

Yet these precedents read awkwardly in the context of the present case, since they assume the paradigmatic drug case in which the substances involved are per se illegal— substances such as cocaine, heroin and the like. All of the aforecited Seventh Circuit cases involve prosecutions for per se illegal drugs like cocaine base (*Barlow*), marijuana (*Lanier*) and crack cocaine (*Jones*). In such cases, knowledge of the specific substance involved will usually automatically imply

knowledge that the substance is controlled.[2] Or, even if the distributor of the substance does not know its specific identity, he or she is at least aware that it is a controlled substance. *See, e.g., Barlow*, 310 F.3d at 1012. Here, and in other analogue cases under § 802(32)(A), the opposite is true—many newly engineered and relatively unknown substances may be involved such that knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance. Indeed new "designer drugs" are often created as alternatives to known illegal drugs precisely because they may be sold with an appearance of *legality*. Unable to keep its controlled substance schedules current in the face of accelerating innovations in drug technology, Congress enacted the Analogue Provision to target distribution of just such substances.

---

[2] The government cites *United States v. Hussein*, 351 F.3d 9, 17 (1st Cir. 2003), *United States v. Cain*, 130 F.3d 381, 384 (9th Cir. 1997), *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001) and *United States v. Fuller*, 162 F.3d 256, 260 (4th Cir. 1998), for the proposition that convictions under the CSA do not require defendants to know that the substances in question are controlled substances. These citations are quite misleading. Despite the government's contrary contentions (or insinuations), all of these cases affirm the baseline principle that defendants must know that the substances in their possession are controlled substances to be convicted under the CSA, even if they do not know the exact identity of the substance they possess. In other words, the language cited by the government deals with defendants' legal rather than factual knowledge. Defendants need not know that possession of a controlled substance is illegal, but they still must know that they possess a controlled substance.

All of these cases also involve traditional, well-known narcotics that are illegal per se, such as cocaine (*Cain*), heroin and cocaine base (*Barbosa*) and crack (*Fuller*). Thus, once again, knowledge of the drug's identity would be sufficient to establish knowledge of the drug's status as controlled. The *Hussein* case involves a non-traditional drug called Khat, and the *Hussein* court accordingly recognized the traditional/nontraditional distinction (though not in those terms), requiring the defendant to know both that he possessed Khat *and* that Khat in turn contained the controlled substance cathinone. 351 F.3d at 17.

And therein lies the rub. The CSA requires a showing of scienter, but the exact contours of this requirement are not obvious in the context of the Analogue Provision. At least one court has ruled that "the definition of controlled substance analogue does not require any scienter—a defendant does not have to 'know' that a substance has a substantially similar chemical structure to an illegal drug." *Forbes*, 806 F. Supp. at 238. *See also United States v. Carlson*, 87 F.3d 440, 443 n.3 (11th Cir. 1996) (citing *Forbes* and noting "the absence of a scienter requirement in the Analogue Act"). Other courts have applied the more general scienter requirement of the CSA, 18 U.S.C. § 841(a), holding that the Analogue Provision "requires the Government to show that the defendants knew that they possessed a controlled substance." *Roberts*, 363 F.3d at 123 n.1. Under this construction, defendants "need not know the exact nature of the drug; it is sufficient that they be aware that they possessed 'some controlled substance.'" *Id.* (citing *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978)). Neither of these approaches seems especially satisfying.

In this particular context, applying the standard requirement that a defendant must know the substance in question is a "controlled substance" is nonsensical since controlled substance analogues are, by definition, not "controlled substances"—their distribution is criminalized, despite their omission from the government's controlled substances schedules, because they have similar chemical structures and either actually or purportedly similar physiological effects to controlled substances. A substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial (applying the three clauses of the Analogue Provision).[3] Direct and literal application of the scienter require-

[3] Such a situation might appear to raise vagueness concerns, and the Second Circuit's recent decision in *United States v. Ansaldi* is instructive

ment applicable to § 841(a), in other words, would threaten to eviscerate the Analogue Provisions of § 802(32)(A) at one stroke.

On the other hand, doing away with the scienter requirement altogether could, as the district court realized, "ensnare individuals engaged in apparently innocent conduct." *See* 286 F. Supp. 2d at 951. Such a construction also would make the Analogue Provision more vulnerable to vagueness challenges. *See Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[A] scienter requirement [in a criminal statute] may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct was proscribed."); *Roberts*, 363 F.3d at 123 ("Because the statute at issue here contains a scienter requirement . . . the defendants' vagueness challenge must be met with some measure of skepticism"). Discarding the scienter requirement would essentially mean that individuals deal in narcotics substitutes at their own risk, removing a primary *mens rea* element of possession and distribution offenses.

---

on this point. The court begins by noting that "[i]t is an interesting question under what circumstances a statute that depends on the resolution of a factual question about which reasonable juries can disagree is specific enough to withstand a vagueness challenge." 372 F.3d 118, 123 (2d Cir. 2004). The court then notes that "[j]uries are often required to determine not only whether certain conduct occurred but also whether the conduct falls within the definition of a statute," citing the Supreme Court's ruling, in considering an obscenity law, that "the possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional." *Id.* at 123 n.2 (citing *Smith v. United States*, 431 U.S. 291, 309 (1977)). Statutes only encounter vagueness difficulties if their terms are "so vague that a jury's determination is likely to be arbitrary, and, consequently, those terms would not allow an ordinary person to understand what conduct is prohibited." *Id.* For more discussion of such issues, see our discussion of the vagueness question, *infra*.

In light of all these considerations, we feel that our precedents demand a showing that the defendant knew the substance in question was a controlled substance analogue. That is, the defendant must know that the substance at issue meets the definition of a controlled substance analogue set forth in § 802(32)(A): A defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects. We recognize that requiring the government to prove scienter as to these criteria may impose a significant prosecutorial burden in some cases. The question of similar chemical structure is particularly nettlesome since, even if such chemical similarities exist, and even if the defendant is aware of these similarities, the intricacies of chemical science may render it extremely difficult to *prove* that a defendant had such knowledge. As a provisional remedy for this problem, we prescribe that, in such cases, if the scienter requirement is met with regard to the second part of the analogue definition (knowledge or representation of similar physiological effects), the jury is permitted—but not required—to infer that the defendant also had knowledge of the relevant chemical similarities.[4]

---

[4] As both the Supreme Court and this Court have made clear, this kind of non-mandatory inference does not place any improper evidentiary burden on the defendant as long as "there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 165 (1979). The jury is always free to accept or reject any such permissible inference, and it remains the government's burden to prove all the elements of the offense beyond a reasonable doubt. Such carefully circumscribed inferences and presumptions are thus a "staple of our adversary system of fact-finding." *Id.* at 156. This is especially so where questions of knowledge or intent are at issue since, as a practical matter, a defendant's state of mind always "must be determined circumstantially, by inference." *Pigee v. Israel*, 670 F.2d 690, 692 (7th Cir. 1982). By contrast, man-

This approach is justified since, as a practical matter, defendants who know or represent to others that the substance in question has physiological effects similar to a controlled substance are likely to be aware of basic chemical similarities as well, even if that fact is difficult to prove conclusively. This approach also dovetails with the common-sense recognition that, in selling or purchasing such substances, all parties to the transaction are primarily interested (perhaps solely interested) in the substance's physiological effects. Yet at the same time, if the defendant truly had no knowledge of the substance's chemical character, or if, under the circumstances, chemical complexities make such knowledge extremely unlikely, an avenue should be left open for defendants to refute such an inference. In any case, our well-established jurisprudence regarding the scienter requirements of controlled substances violations require that juries confront these questions of knowledge squarely.

The district court, while acknowledging that the scienter requirement implied by its own jury instruction "[p]erhaps goes too far," maintains that its jury instructions were non-prejudicial since the jury specifically determined that Turcotte represented or intended that GBL had physiological effects similar to GHB. 286 F. Supp. 2d at 951. However, as just discussed, while such a determination suffices to demonstrate scienter with respect to the second prong of the analogue definition (actual or intended similar physiological effect), it is not equivalent to finding *knowledge* of actual chemical similarity. One could represent to others (earnestly or not) that a substance has physiological effects similar to a

---

datory or conclusive presumptions, which *require* the jury to infer some "ultimate" or "elemental" fact from the existence of "evidentiary" or "basic" facts, present much stickier constitutional problems. For definitive discussions of inferences, presumptions and the issues surrounding them, *see Allen*, 442 U.S. at 156-67; *Sandstrom v. Montana*, 442 U.S. 510, 514-27 (1979); *Pigee*, 670 F.2d at 692-97.

controlled substance despite being totally ignorant of its actual chemical properties. Turcotte's representations as to the physiological effects of GBL do create a presumption that such knowledge existed, but the jury did not confront this question directly below. Given the evidence adduced at trial, it appears a jury certainly could have determined that Turcotte had the requisite knowledge to trigger liability under § 802(32)(A) (though the evidence does not compel such a conclusion).[5] However, the jury was specifically instructed to forego this determination. The district court's instructions as to scienter were thus, at best, incomplete and, at worst, highly misleading as to the prerequisites for liability under the Analogue Provision.

Ordinarily such shortcomings might amount to reversible error, but in the present case we find any deficiencies in the district court's scienter instructions harmless. The jury specifically found that Turcotte knew the substance he possessed contained GBL, and unlike many other potential controlled substance analogues, Congress has specifically identified GBL as an analogue of GHB. *See United States v. Ansaldi*, 372 F.3d 118, 123 (2d Cir. 2004) ("GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue."); *United States v. Fisher*, 289 F.3d at 1336 (noting that "statements found in Public Law

---

[5] There is evidence that the website through which Turcotte sold Verve 5.0 (GBL) contained assertions that Verve is the "absolute finest quality GHB precursor" and that its ingredients are "illegal nationwide." (*See* Trial Tr. 844-47).) For his part, Turcotte attempts to blunt the import of this evidence, claiming that he played no part in building the website and had no knowledge of GBL's chemical similarities to GHB. While Turcotte's testimony on this score perhaps seems dubious, we recognize that weighing contradictory evidence and making credibility determinations are functions generally reserved for the jury. Accordingly, on appeal we may not impute the requisite knowledge to Turcotte based on these website assertions, however much they may affect the equities of the situation.

106-172 and the DEA's Final Rules indicate that both Congress and the DEA considered GBL to be an analogue of GHB.").

In amending the Controlled Substances Act to include GHB, Congress declared that "[i]f taken for human consumption, common industrial chemicals such as gamma butyrolactone [GBL] and 1,4-butanediol [BD] are swiftly converted by the body into GHB. Illicit use of *these and other GHB analogues* and precursor chemicals is a significant and growing law enforcement problem." Pub. Law No. 106-172, § 2(4) (2000) (emphasis added). DEA regulations also specify that "GBL and 1,4-butanediol are *structurally and pharmacologically similar to GHB* and are often substituted for GHB. Under certain circumstances they may satisfy the definition of a controlled substance analogue." Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act, 65 Fed. Reg. 21,645-47 (April 24, 2000) (emphasis added). As the Second Circuit asserted in *Ansaldi*, "[r]egardless of any other ways in which the laws governing controlled substance[s] might be vague, there is one thing they make perfectly clear—the sale of GBL for human consumption is illegal." 372 F.3d at 122. *Cf. United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002) (holding that these Congressional pronouncements also confirm BD's status as a controlled substance analogue).

In our view such pronouncements are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue.[6] Thus having acknowledged that he *knew* he was selling substances containing GBL, Turcotte cannot then turn around and claim that he had no knowledge

---

[6] See also our discussion of Turcotte's vagueness claims, *infra* at section III-D.

of GBL's status as an analogue of GHB.[7] As with other known controlled substances (including GHB), knowledge of the substance's specific identity implies knowledge of the substance's legal status. Ignorance of the relevant legal provisions is no defense. *See Ansaldi*, 372 F.3d at 128 (holding that defendants' belief that "they were breaking no law by selling GBL" does not constitute a defense); *United States v. Desurra*, 865 F.2d 651, 653 (5th Cir. 1989) (similar holding).

Applied to any other controlled substance analogue, an instruction such as the one given here might well warrant reversal of a conviction. However, given the clear Congressional and regulatory pronouncements of the status of GBL, any error in the district court's scienter instructions were harmless. Accordingly, we affirm the ruling of the district court on this issue.

C. The *Brady* Claim

Turcotte next claims that the prosecution violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by improperly withholding FDA Investigational New Drug Applications (INDs) during the trial. *Brady* instructs that the prosecution has an affirmative duty to disclose all information that is (1) in the government's possession, (2) material and (3) exculpatory. *United States v. Bhutani*, 175 F.3d 572, 576 (7th Cir. 1999); *United States v. Hartbarger*, 148 F.3d 777, 786 (7th Cir. 1998). Under our precedents, any evidence whose "suppression undermines confidence in the outcome of the trial is considered material." *United States v. Gonzalez*, 93 F.3d 311, 316 (7th Cir. 1996) (quotations omitted). Crucially, district courts have broad discretion in determining *Brady* violations, and so this Court reviews the decision

---

[7] We pause to note that the jury also found that Turcotte intended or represented that GBL has similar physiological effects to GHB. Thus, as a matter of common sense, it would seem strange to allow Turcotte to claim he did not know GBL is an analogue of GHB.

below only for abuse of discretion. *United States v. Knight*, 342 F.3d 697, 705 (7th Cir. 2003) ("The district court maintains broad discretion to determine Brady violations; we will review the exercise of that discretion for abuse only."); *United States v. Wilson*, 287 F.3d 827 (7th Cir. 2001) (same rule).

In the decision below, the district court ruled that the government disclosed the INDs "promptly after learning of their existence" such that "[d]efense attorneys were . . . able to review the material and use it during the trial." 286 F. Supp. 2d at 951. The district court further determined that the INDs contained no real exculpatory information and that any government delay in producing the materials did not undermine confidence in the outcome of the trial. *Id.* Turcotte, on the other hand, claims that the government was 18 months late in disclosing the INDs, and that the INDs were exculpatory since they contained information that contradicted the testimony of government expert witnesses regarding the harmful effects of GHB, including FDA approval of Xyrem, a drug used for treating narcolepsy that contains GHB. (Appellant's Br. at 26-27.) Turcotte claims that because of the government's tardy disclosure, his own expert witnesses did not have sufficient time to review these INDs and thus that he was not able to present this exculpatory evidence at trial. (Appellant's Br. at 26-28, Exh. 1.)

If only Turcotte had bought and distributed Xyrem to treat narcolepsy, he might have a colorable claim. As it is, his *Brady* claim fails. It is undisputed that the government did disclose the material in question, albeit somewhat later than it ought, and the district court determined that Turcotte had sufficient time to review the materials and use them in his defense. The district court also allowed Turcotte to recall government expert witnesses after presentation of the prosecution's case in chief and cross-examine them as to information contained in the INDs, though Mr. Turcotte apparently declined to do so. (*See* Appellee's Br. at 25-26.)

Lastly, even if the INDs contain the information that Turcotte alleges, they do not change the fact that GHB was a Schedule I controlled substance at the time of Turcotte's alleged conduct, that GBL was found by the jury to be an analogue of GHB and that Turcotte sold GBL for impermissible purposes. The other medical uses of GHB allegedly described in the INDs are not particularly relevant to Turcotte's conduct or to the facts of this case. That GHB may have been approved for another use as a component of some other drug does not alter the fundamental basis of Turcotte's liability. The district court has broad discretion in identifying *Brady* violations, and nothing in the record suggests that the district court abused this discretion. We therefore affirm the ruling of the district court rejecting Turcotte's *Brady* claim.

D. The Vagueness Claim

Turcotte's final major claim is that the Analogue Provision of the CSA is unconstitutionally vague in that "it fails to provide fair notice to the public regarding what substances are 'analogues' and therefore prohibited." (Appellant's Br. at 34.) Under *Kolender v. Lawson*, a penal statute is void for vagueness if it does not define an offense with sufficient clarity to allow people of ordinary intelligence to understand what conduct is prohibited or if it is so vague as to allow for arbitrary or discriminatory enforcement. 461 U.S. 352, 357 (1983). Turcotte claims that the term "substantially similar" in § 802(32)(A) is too vague to advise people of ordinary intelligence as to which substances qualify as control substance analogues. (Appellant's Br. at 34-40.) The district court disagreed, ruling that "a person of ordinary intelligence should recognize the similarity between GBL and GHB, and that Section 802(32)(A) is not unconstitutionally vague." 286 F. Supp. 2d at 95152 (citing *Fisher*, 289 F.3d at 133839). We review *de novo* a challenge to the constitutionality of a

federal statute. *United States v. Vallejo*, 373 F.3d 855, 859 (7th Cir. 2004).

In support of his contention, Turcotte claims there is no scientific consensus on the chemical similarity of GBL to GHB (while it is undisputed that the two compounds differ only by a few atoms, they are classified as different types of compounds and have different physical shapes) nor any established scientific definition of the term "substantially similar" as applied to questions of molecular chemistry. (Appellant's Br. at 35-38.) Turcotte also points out that several common substances either contain GHB or convert to GHB at some point in the human metabolic process, which makes the targeting of GBL and GHB essentially arbitrary. (Appellant's Br. at 38-40.)

These points are well-taken, but the relevant case law suggests that Turcotte faces an uphill battle. As an initial matter, we note that our ruling here confirming that the Analogue Provision carries a robust scienter requirement casts doubt on Turcotte's vagueness challenge from the outset. *Cf. Roberts*, 363 F.3d at 123 ("Because the statute at issue here [§ 802(32)(A)] contains a scienter requirement. . . the defendants' vagueness challenge must be met with some measure of skepticism, at least with regard to the 'fair notice' prong of *Kolender*.") Under Supreme Court precedent, the constitutionality of an allegedly vague statutory standard "is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Specifically, due process concerns about notice are "ameliorated" when a statute contains a scienter requirement. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

Yet even leaving aside the implications of our scienter ruling, the Analogue Provision seems to us sufficiently clear by its own terms. The circuit courts considering this issue have unanimously held that the CSA's Analogue Provision is

not unconstitutionally vague. *See, e.g., United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990) (ruling that the CSA'a Analogue Provision is "clearly and specifically defined, in terms readily comprehensible to the ordinary reader"); *United States v. Klecker*, 348 F.3d 69, 72 (4th Cir. 2003); *United States v. Orchard*, 332 F.3d 1133, 1137-38 (8th Cir. 2003); *United States v. Washam*, 312 F.3d 926, 930-32 (8th Cir. 2002); *Carlson*, 87 F.3d at 443-44; *United States v. Hofstatter*, 8 F.3d 316, 321-22 (6th Cir. 1993); *United States v. Desurra*, 865 F.2d 651, 653 (5th Cir. 1989) (per curiam). The one contrary precedent, which Turcotte cites in support of his own arguments, is *United States v. Forbes*, 806 F. Supp. 232 (D. Colo. 1992), in which a district court held the Analogue Provision to be unconstitutionally vague as applied to the drug AET. The court in *Forbes* found the Act lacking with respect to AET because "there is no scientific consensus whether AET has a chemical structure that is substantially similar to DMT or DET. The government's own chemists cannot agree on this point . . . . [t]he scientific community cannot even agree on a methodology to use to determine structural similarity." *Id.* at 237.

Again, *Forbes* is instructive so far as it goes, but, it can be distinguished from the instant case since it involved AET rather than GBL. This distinction is crucial because no fewer than three courts of appeals have held the Analogue Provision to be sufficiently clear with respect to GBL and/or BD. In *United States v. Roberts*, the Second Circuit held that the Analogue Provision was not unconstitutionally vague in identifying BD as an analogue of GHB, stating that the acknowledged similarity in the chemical structures of the two compounds, *combined with the fact that* BD turns into GHB when ingested, are collectively sufficient to put an ordinary person on notice that BD is an analogue of GHB for purposes of the CSA. 363 F.3d at 125. The Roberts court insists that these two factors, when considered together, make the legal implications of the Analogue Provision clear with respect to

BD, notwithstanding the fine-grained scientific distinctions of expert chemists. 363 F.3d at 127.[8]

Another Second Circuit panel, convened not three months later, used this same analytical approach to conclude that "the definition of 'controlled substance analogue/ is *not unconstitutionally vague as applied to GBL*." *Ansaldi*, 372 F.2d at 124 (citing *Roberts* and pointing to "uncontroverted testimony that GBL's chemical structure differed from that of GHB by only three atoms" and that "GBL converted into GHB after ingestion") (emphasis added). The *Ansaldi* court also points out forcefully that "GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue." 372 F.2d at 123.[9] These same points

---

[8] The exact language of the *Roberts* court's analysis reads as follows:

> Given the combination of GHB's cognizable similarity to 1,4-butanediol prior to ingestion and its metabolization into that controlled substance after ingestion, the classification of 1,4-butanedyol as a controlled substance analogue is clearly mandated by the Act's language, and remains so regardless of the differences of view among the experts. In short, given the circumstances of this case, an evaluation of the statute's vagueness as applied does not call for the fine distinctions drawn by the experts.

363 F.3d at 127.

[9] The *Ansaldi* court speaks in no uncertain terms on the vagueness issue:

> Regardless of any other ways in which the laws governing controlled substance[s] might be vague, there is one thing they make perfectly clear—the sale of GBL for human consumption is illegal.
>
> . . .
>
> The subsection defining "controlled substance analogue" specifically states that "[t]he designation of gamma butyrolac tone . . . as a listed chemical . . . *does not preclude* a finding . . . that the chemical is a controlled substance analogue."
>
> 21 U.S.C. § 802(32)(B) (emphasis supplied). Thus, GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue.

372 F.3d at 122-23.

are echoed in *United States v. Fisher*, where the Eleventh Circuit also held that the Analogue Provision is sufficiently clear with respect to the status of GBL. The Fisher court likewise notes that GBL converts into GHB when ingested, 289 F.3d at 1338-39, and observes that "statements found in Public Law 106-172 and the DEA's Final Rules indicate that both Congress and the DEA considered GBL to be an analogue of GHB." 289 F.3d at 1336.

Among these Congressional "statements" is the following declaration: "If taken for human consumption, common industrial chemicals such as gamma butyrolactone [GBL] and 1,4-butanediol [BD] are swiftly converted by the body into GHB. Illicit use of *these and other GHB analogues* and precursor chemicals is a significant and growing law enforcement problem." Pub. Law No. 106-172, § 2(4) (2000) (emphasis added). DEA regulations contain similar statements: "GBL and 1,4-butanediol are *structurally and pharmacologically similar to GHB* and are often substituted for GHB. Under certain circumstances they may satisfy the definition of a controlled substance analogue." Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act, 65 Fed. Reg. 21,645-47 (April 24, 2000) (emphasis added).[10]

Admittedly, these provisions may not be using the terms "analogue" or "similar" in their technical statutory sense under the CSA, but nonetheless it is difficult indeed to claim that Turcotte lacked notice as to the chemical similarities of GBL and GHB, or as to the likelihood of being prosecuted for distribution of GBL. Indeed, Turcotte advertised Verve 5.0 as a GHB substitute on his website, which actually stated that Verve is illegal.[11] As the Second Circuit asserted in *Ansaldi*, "[r]egardless of any other ways in which the laws governing

---

[10] See also our discussion of these provisions in relation to Turcotte's scienter claim, *supra* at section III-B.

[11] *See* footnote 5, *supra*.

controlled substance[s] might be vague, there is one thing they make perfectly clear—the sale of GBL for human consumption is illegal." 372 F.3d at 122.

This level of clarity also speaks to the second prong of the *Kolender* test, which concerns arbitrary or discriminatory law enforcement. Law enforcement officials, no less than potential drug distributors, are on notice that GBL is considered an illegal analogue of GHB when sold for human consumption, and they are directed to aggressively prosecute its possession and sale. In short, it is not left to the police to arbitrarily determine the legal status of GHB, GBL or BD—Congress has spoken clearly with respect to these substances.

Given the foregoing, we affirm the district court's ruling that the CSA is not unconstitutionally vague as applied to GBL as an analogue of GHB.

E. The Status of GBL and BD as Controlled Substance Analogues

Having assailed the district court's jury instructions, the government's conduct during discovery and the constitutionality of the Analogue Provision itself, Turcotte next challenges the applicability of the Analogue Provision to the substances at issue in this case. His claims on this score are essentially twofold: (1) that federal law prevents BD and GBL from being regulated, and, even if GBL and BD are subject to regulation, their status is confusing and the rule of lenity should be applied in Turcotte's favor, and (2) that GHB was not properly scheduled as a controlled substance since its scheduling (allegedly done at the behest of the Attorney General) has expired and therefore Turcotte cannot be punished for trafficking in its chemical analogues. Both claims are frivolous and fail on their own terms.[12]

---

[12] The government argues for a deferential standard of review as to these claims, noting that they were either raised in an untimely filed post-

1. The Regulation of BD and GBL as Controlled Substance Analogues Under Federal Law

Turcotte first claims that the Dietary Supplements Health and Education Act of 1994 (DSHEA), 21 U.S.C. § 321, precludes regulation of GBL and BD since both substances are dietary supplements and thus must be treated as "food" under the DSHEA. (Appellant's Br. at 29.) Turcotte also asserts that because GBL is a "List I chemical" under 21 U.S.C. §§ 802(33) and 802(34), pursuant to an April 2000 DEA Final Rule, GBL is not subject to regulation. These arguments are, at best, unpersuasive and, at worst, disingenuous. The district court noted below that the DSHEA "does not prevent the classification of GBL as a controlled substance analogue," 286 F. Supp. 2d at 952, and the government points out that GBL meets the DSHEA's definition of a "drug" and is known as a common industrial chemical. (Appellee's Br. at 30-31.) In fact Turcotte himself labeled his shipments of Verve to Internet customers as "cleaning supplies" or "supplies," not dietary supplements. *Id.* The DSHEA does not address GBL or BD specifically, so both parties are essentially attempting to shoehorn these substances into the DSHEA's general definitions. This is a dubious enterprise considering that the CSA addresses the status of GBL explicitly, stating that it is a "List I chemical" under 21 U.S.C. §§ 802(33) and 802(34). This appears the more relevant provision for our purposes.

Perhaps realizing this, Turcotte next claims that GBL's status as a "Listed chemical" under the CSA precludes its regulation as a controlled substance. To support this conten-

---

trial motion, *United States v. Withers*, 972 F.2d 837, 844 (7th Cir. 1992) (reviewing such claims for clear error), or raised for the first time on appeal. *United States v. Noble*, 246 F.3d 946, 955 (7th Cir. 2001) (reviewing such claims for clear error). The exact standard of review applicable here is of no consequence, since Turcotte's claims are doomed even under *de novo* review.

tion, Turcotte points to a DEA regulation which states, in part, that "[c]hemical mixtures containing GBL . . . are not subject to regulation." 65 Fed. Reg. 21,645 (Apr. 24, 2000). But this line of argument is patently without merit. The very regulation cited by Turcotte also explicitly states that the CSA, at 21 U.S.C. § 802(32), expressly provides that "the designation of GBL or any other chemical as a Listed chemical does not preclude a finding that the chemical is a controlled substance analogue and subject to the provisions of 21 U.S.C. 813." 65 Fed. Reg. 21,645 (Apr. 24, 2000) (citing 21 U.S.C. § 802(32)) (emphasis added). *See also Ansaldi*, 372 F.3d at 128 n.6 (also ruling that GBL's status as a listed chemical under DEA regulations does not preclude its regulation as a controlled substance analogue under the CSA). In fact Turcotte himself concedes that the clear provisions of the CSA (at 21 U.S.C. § 802(32)(B)) doom his argument, though he tries to blunt the impact of this point by hiding it in a footnote. See Appellant's Br. at 30 n.11 (conceding that "GBL's designation as a listed chemical does not preclude a finding that the chemical is a controlled substance analogue. 21 U.S.C. § 802(32)(B).").

Having obliterated his own argument regarding GBL's susceptibility to regulation, Turcotte next argues in the alternative that, even if GBL can be regulated as a controlled substance analogue (as he concedes), the various laws and regulations cited here render GBL's status confusing, and the rule of lenity should be applied to reverse his conviction. (Appellant's Br. at 31-32.) While the rule of lenity instructs that ambiguity in the meaning of a statutory provision should be resolved in favor of the defendant, this principle is only applicable where there is a "grievous ambiguity or uncertainty in the language and structure of the Act." *U.S. v. Ranum*, 96 F.3d 1020, 1030 (7th Cir. 1996) (quoting *United States v. Neal*, 46 F.3d 1405, 1410 (7th Cir. 1995)) (internal quotations omitted). In other words, the rule of lenity "only

serves as an aide for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States*, 364 U.S. 587, 596 (1961).

As just discussed, the law is perfectly clear on this point: As per both the CSA itself and the DEA regulation cited by Turcotte, GBL is not exempt from regulation under the CSA as a controlled substance analogue. Turcotte himself acknowledges this fact in his brief. See Appellant's Br. at 30, n.11. *See also Ansaldi*, 372 F.3d at 128 n.6 (observing that the DEA "regulation [concerning GBL] does not even purport to remove any substance from the realm of criminal conduct."). The rule of lenity is not applicable here. This is especially so given our rejection of Turcotte's vagueness claims[13]—it would be passing strange for us to rule that a statute, while not unconstitutionally vague, is sufficiently ambiguous to trigger the rule of lenity.

For all of these reasons, Turcotte's claim that federal law precludes the regulation of GBL as an analogue of GHB are patently without merit.

2. GHB's Status as a Controlled Substance

Having attempted to question GBL's susceptibility to regulation in its own right, Turcotte's next claims that GHB was not properly scheduled as a controlled substance, and therefore that GBL cannot be regulated as a controlled substance analogue of GHB. Turcotte asserts that GHB was put on Schedule I at the behest of the Attorney General in March of 2000 as a temporary or emergency scheduling under 21 U.S.C. § 811(h), which expires if not made permanent within one year. Turcotte then claims that since GHB's status as a Schedule I controlled substance allegedly expired in March of 2001, he cannot be convicted for possession or distribution of its analogues, including GBL.

---

[13] *See* discussion of Turcotte's vagueness claim, *supra*.

The government responds by asserting that Congress directed the Attorney General to place GHB on Schedule I in Public Law 106-172, and thus that the aforementioned time limit applicable to emergency schedulings should not apply.

We need not attempt to navigate this legislative thicket because Turcotte's expiration claim fails for a more basic reason: Even if the scheduling of GHB expired in March of 2001 as Turcotte claims, it is undisputed that GHB was still a Schedule I controlled substance at the time of the conduct leading to Turcotte's arrest and conviction (the summer of 2000).[14] Matters of timing similarly thwart Turcotte's claim that FDA approval of Xyrem—a drug for treating narcolepsy that contains GHB—in July of 2002 converted GHB to a Schedule III substance not subject to the CSA's Analogue Provision. (Appellant's Br. at 33-34.) Aside from the fact that FDA approval of a specific drug for certain medical uses need not have any bearing on the status of its component chemicals in nonmedical contexts, the FDA's approval of Xyrem came *after* Turcotte's misconduct and subsequent arrest in September of 2000. Thus, even if the FDA approval of Xyrem has some effect on the status of GHB as a controlled substance—a proposition which appears extremely dubious to begin with—that approval still would not have any bearing on Turcotte's conviction.

Turcotte's claims as to the status and/or scheduling of GHB under the Controlled Substances Act are thus unpersuasive, and we affirm the ruling of the district court on this point.

---

[14] The district court makes precisely this point in its ruling below, noting that "even if we were to accept defendant's argument that the scheduling had expired, GHB was clearly listed in Schedule I during the period of time in which defendant was found to have possessed and distributed the substances." 286 F. Supp. 2d at 952.

F. Turcotte's Sundry Procedural Claims

Finally, in addition to the more fully developed claims examined above, Turcotte tacks on five allegations of trial errors and procedural infirmities. These claims are not discussed in the decision below and presumably were not raised before the district court. They are presented in such a cursory and unelaborated fashion that we feel justified in dismissing them outright. In this circuit, unsupported and undeveloped arguments are waived. *See United States v. Toney*, 27 F.3d 1245, 1249 (7th Cir. 1994); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991); *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990); *United States v. Williams*, 877 F.2d 516, 519 (7th Cir. 1989).

Yet even were we to indulge Turcotte and take these claims seriously, they still fail on their own terms. Turcotte's claim that "the use of expert testimony regarding GHB was irrelevant to testimony concerning GBL and BD," (Appellant's Br. at 40), is false. Testimony concerning the health effects of GHB was directly relevant to the second and third clauses of § 802(32)(A), which require controlled substance analogues to have similar actual or purported physiological effects to controlled substances. Thus consideration of GHB's physiological effects was crucial to the jury's determination that GBL, in light of its own physiological effects, is an analogue of GHB. (*See* Appellee's Br. at 43-44.)

Turcotte's second claim, that his "sentence was necessarily based upon the sale of all three substances [GHB, BD and GBL]," (Appellant's Br. at 41.), is little more than a weak reprise of assertions made earlier in the brief concerning disjunctive versus conjunctive readings of § 802(32)(A). For the reasons discussed in that portion of our opinion, *supra*, this claim is directly contradicted by the record and is thus unsupportable.

Turcotte's third claim alleges that the district court improperly allowed two unqualified witnesses to testify as experts regarding the similarity of effects between GHB, GBL and BD. (Appellant's Br. at 41.) Even if Turcotte had raised this claim previously—which apparently he did not—we still review for abuse of discretion only. *United States v. Van Dreel*, 155 F.3d 902, 905 (7th Cir. 1998). Given that both witnesses had advanced scientific degrees (one had a Ph.D. in medical anthropology and one was a medical doctor) and both had published extensively on the effects of GHB and GBL, there is no evidence that the district court abused its discretion in certifying them as expert witnesses.

The fourth claim concerns an episode in which a juror in the case encountered a prosecution witness during a court recess and asked the witness for a mint. Turcotte alleges that the court should have made a more extensive inquiry into the incident or granted Turcotte a mistrial. (Appellant's Br. at 41-42.) Turcotte presents absolutely no evidence of any wrongdoing or resulting prejudice connected with this ostensibly chance encounter, and thus he has not even begun to carry his burden of demonstrating an abuse of discretion by the district court. *See United States v. Cassano*, 372 F.3d 868 (7th Cir. 2004) (district court's decision not to grant a mistrial is reviewed for abuse of discretion).

Finally, Turcotte's allegation of ineffective assistance of counsel is likewise too sparse and unsupported to gain any traction. Turcotte's unsubstantiated and largely conclusory statements fall far short of carrying his burden of persuasion as to the two elements of the test outlined in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). *See United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir. 1993) (defendant bears burden of proof and persuasion to establish ineffective assistance of counsel). We also note that, should Turcotte wish to pursue his ineffective assistance claim in earnest, such a claim is best brought in a collateral proceeding under

28 U.S.C. § 2255. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) (Observing that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance").

Accordingly, we reject four of these five claims, which seem to be added as afterthoughts to Turcotte's main arguments, and we decline to rule on the fifth (ineffective assistance) at this juncture.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 14, 2005

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*
HON. DIANE P. WOOD, *Circuit Judge*

No. 03-2988

JAMES R. TURCOTTE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee,

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division

No. 00 CR 737-2
James B. Moran, Judge

AMENDED ORDER

On consideration of the petition of James R. Turcotte* for rehearing with suggestion for rehearing *en banc* filed May 27,

---

* Chief Judge Flaum did not participate in the consideration of this Petition for Rehearing.

2005, in the above-captioned case, no judge in active service has requested a vote in the petition for rehearing *en banc*, and all of the judges on the original panel have voted to deny rehearing.

Therefore, the petition for rehearing with suggestion for rehearing *en banc* is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 00 CR 737

UNITED STATES OF AMERICA,

vs.

JAMES R. TURCOTTE,

Defendant.

MEMORANDUM OPINION AND ORDER

On November 22, 2002, following a jury trial, defendant James R. Turcotte was found guilty of three counts arising from the possession and distribution of controlled substances. Defendant filed motions seeking a judgment of acquittal or, alternatively, a new trial. For the following reasons, defendant's motions are denied.

BACKGROUND

In Count One of the indictment, defendant was charged with knowingly selling misbranded drugs, namely Gamma Hydroxybutyric Acid (GHB), Gamma Butyrolactone (GBL) and Butanediol (BD) in violation of 21 U.S.C. §§ 331(a) and 333(a)(2) and 18 U.S.C. §§ 371 and 372. In Count Two, defendant was charged with possessing, with the intent to distribute, mixtures containing controlled substances, during the period of March 13, 2000, to September 8, 2000, in violation of 21 U.S.C. §§ 841(a)(1) and 813. In Count Five, defendant was charged with possessing, with intent to distribute, approximately 60 gallons of GHB and GBL, in violation

of 21 U.S.C. §§ 841(x)(1) and 813. Defendant's trial on these three counts began on November 12, 2002, and on November 22, 2002, he was found guilty of all counts. January 22, 2003, was set as the final day for post-trial motions. On January 22, 2003, defendant, through his attorneys, presented a series of arguments seeking a judgment of acquittal or a new trial. On March 20, 2003, through separate counsel, defendant filed a supplemental memorandum to his post-trial motions, presenting new arguments in support of these motions.

DISCUSSION

Federal Rules of Criminal Procedure 29(c) and 33 allow a defendant to file motions for judgment of acquittal and for a new trial, respectively. These motions must be filed within seven days of a guilty verdict or within any other time established by the court during the seven-day period. While we recognize that defendant's supplemental memorandum, which presented new arguments, was filed well after the allowable period for post-trial motions, we will deal with all arguments presented by defendant's counsel. The arguments presented in the supplemental memorandum are closely related to those contained in the original motion and the government's attorneys had a fair opportunity to respond.

Defendant argues: (1) the jury instructions defining "controlled substance analogue" were defective in that they asked the jurors to read the elements in the disjunctive; (2) the jury instructions for Count Five were fatally defective in that they allowed defendant to be found guilty, without knowing that a specific drug was a controlled substance; (3) the government failed to disclose "Brady" material; (4) the controlled substance analogue act as applied to GBL and GHB, and the emergency scheduling of GHB, are unconstitutionally vague; (5) the evidence that GBL and BD are analogues of GHB was insufficient; (6) other federal law prevents BD and GBL from being controlled substance analogues; (7) the scheduling of GHB as a Schedule I controlled substance has expired; and

(8) the defendant's fundamental constitutional rights were infringed when the government decided to regulate these controlled substances.

The jury instructions defining controlled substance analogue were not defective when read in conjunction with the special verdict forms. In determining whether specific substances were analogues of the Schedule I substances, the jury was asked to read the three elements of 21 U.S.C. § 802 (32)(a) in the disjunctive.[1] This allowed the jury to determine that GBL and BD were analogues of GHB without necessarily determining that the chemical structures of the substances were substantially similar. A number of district courts have read the statute in the conjunctive in order to avoid absurd results, *see United States v. Vickery*, 199 F. Supp, 2d 1363, 1371 (N.D. Ga. 2002); *United States v. Clifford*, 197 F. Supp. 2d 516, 522 (E.D. Va. 2002), and we are inclined to agree. The Seventh Circuit has never dealt with the reading of Section 802(32)(A). Such a determination, however, does not affect defendant's conviction. The jury's special verdict forms

---

[1] The Controlled Substance Act, 21 U.S.C. § 802(32)(A) provides, in relevant part:

> the term "controlled substance analogue" means a substance—
>
> a. the chemical structure of which is substantially similar to the chemical structure of a controlled substance in. Schedule I or II;
>
> b. which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or
>
> c. with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II.

establish that the government proved all three elements of Section 802(32)(A) beyond a reasonable doubt with respect to GHB and that it did not prove BD was an analogue. And in finding defendant guilty of Count Five, the jury made it abundantly clear that it found defendant had engaged, with another, to possess with intent to deliver GHB.

The jury instructions detailing the elements of Count Five were also sufficient. 21 U.S.C. §841(a)(1) clearly contains a knowledge element. But "knowingly" is customarily interpreted as factual knowledge, as distinguished from knowledge of the law, consistent with the maxim that ignorance of the law is no excuse. *Bryan v. United States*, 524 U.S. 184,192-95 (1998). The jury verdict established that defendant knowingly possessed GBL and the special verdict established that GBL is a controlled substance analogue of GHB. GHB is a Schedule I controlled substance, and, pursuant to 18 U.S.C. §813, a controlled substance analogue intended for human consumption is treated as a Schedule I controlled substance.

The defendant possessed an analogue with intent to distribute and, according to *United States v. DeSurra*, 865 F.2d 651, 653 (5th Cir. 1989), that is enough even if he did not know it was an analogue. Perhaps that goes too far, as it might, possibly, in other circumstances, ensnare individuals engaged in apparently innocent conduct. *See Bryan v. United States*, *supra*, at 194. But here, by the special verdict, the jury determined that defendant represented or intended that GBL had a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar or greater than the effect of GHB.

There is no evidence that the government failed to disclose any "Brady" material to the defendant, thereby resulting in prejudice to the defendant. The Constitution requires that prosecutors disclose any evidence they possess that is material to either guilt or punishment. *Brady v. Maryland*, 373

U.S. 83 (1963). Prosecutors turned over the Investigational Drug Applications (INDs) promptly, after learning of their existence. Defense attorneys were therefore able to review the material and use it during the trial. Moreover, defendant, even now, directs us to no information contained in the INDs that leads us to believe that defendant sold the controlled substances for legitimate uses or that otherwise serves to undermine confidence in the result of the trial. *See United States v. Gonzalez*, 93 F.3d 311, 315 (7 h Cir. 1996) *quoting United States v. Bagley*, 473 U.S. 667, 678 (1985).

The Controlled Substance Analogue Statute is not unconstitutionally vague as applied to GBL and GHB. A criminal statute is void for vagueness only if ordinary people cannot figure out what type of conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The jury in this case determined by the special verdict form that defendant sold GBL as an alternative to GHB, representing or intending that it have a similar effect. Moreover, the evidence clearly established the chemical and functional similarities of the two components. The Eleventh Circuit, in *United States v. Fisher*, 289 F.3d 1329,1338-39 (11th Cir. 2002), dealt with this exact issue, holding that a person of ordinary intelligence should recognize the similarity between GBL and GHB, and that Section 802(32)(A) is not unconstitutionally vague.

Likewise, the scheduling of GHB as a controlled substance is not unconstitutionally vague. Congress voted to direct the Attorney General to issue an order listing GHB in Schedule I. Because Congress acted directly, it was unnecessary to follow the procedures set forth in the Administrative Procedure Act. Once GHB was listed on the schedule, any reasonable person would know that the possession and distribution was prohibited by law.

We find no reason to challenge the jury's determination that GBL is a controlled substance analogue of GHB. If any reasonable fact-finder could have found that the elements of a

crime were established beyond a reasonable doubt, we will not disturb the jury's verdict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999). Prosecutors offered extensive evidence as to the similarities of the two substances, both physically and functionally. Defendant offers no reasons for us to disregard this evidence or any reasons why it was insufficient to support the jury's verdict.

The Dietary Supplements Health and Education Act, 21 U.S.C. § 321 (DSHEA), does not prevent the classification of GBL as a controlled substance analogues. Defendant claims that the Drug Enforcement Agency (DEA) has affirmatively determined that GBL is not a regulated substance. All that the DEA's statement actually says is that (as of 1998) GBL itself is not listed on a schedule as a controlled substance. 65 FR 21645-01. The DEA goes on to state that "[c]hemical mixtures containing GBL will be treated the same as chemical mixtures containing any listed chemical." 65 FR 21645-01. Because the jury determined that GBL is a controlled substance analogues of GHB, DSHEA indicates that we should treat it as any other analogues of controlled substances.

Defendant's argument that the scheduling of GHB has expired also fails. As stated above, Congress, rather than the Attorney General, made the determination to list GHB as a Schedule I substance. The scheduling was therefore not an emergency scheduling, which would have been limited to a term of 18 months. Because Congress made the determination, the time limit does not apply. In any case, even if we were to accept defendant's argument that the scheduling had expired, GHB was clearly listed in Schedule I during the period of time in which defendant was found to have possessed and distributed the substances.

Finally, the government's regulation of the possession and distribution of controlled substances does not violate any of

defendant's constitutionally protected rights. Defendant appears to make this argument mainly for purposes of appeal. We note that courts have repeatedly determined that Congress has the power under the Constitution to regulate the possession and distribution of drugs and that this governmental regulation does not infringe any constitutionally protected rights. *See, e.g., United States v. Westbrook*, 125 F.3d 996 (7th Cir.1997) (holding that the Commerce Clause, U.S.C.A. Const. Art. 1, § 8, cl.3, gives Congress the power to regulate drug distribution).

CONCLUSION

For the foregoing reasons, defendant's motions for a judgment of acquittal or a new trial are denied.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U. S. District Court

July 2, 2003.

FILED
DEC 9 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-336

In the Supreme Court of the United States

JAMES R. TURCOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court omitted a necessary element of the offense in instructing the jury on scienter in a prosecution for possession with intent to distribute the controlled substance analogue Gamma Butyrolacetone (GBL), in violation of 21 U.S.C. 813 and 841(a)(1).

2. Whether the court of appeals erred in finding no reversible error in the jury instructions, where it is sufficient to convict a defendant of possession of GBL with intent to distribute that the defendant know the substance is GBL, and the jury instructions required a finding that petitioner knew the substance was GBL.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Neder v. *United States*, 527 U.S. 1 (1999) 9, 13, 15, 16
Powell v. *Galaza*, 328 F.3d 558 (9th Cir. 2003) 15
United States v. *Ansaldi*, 372 F.3d 118 (2d Cir.), cert. denied, 125 S. Ct. 364 and 430 (2004) 8, 11, 12
United States v. *Brown*, 202 F.3d 691 (4th Cir. 2000) 15
United States v. *Ellis*, 326 F.3d 550 (4th Cir. 2003) 2
United States v. *Fisher*, 289 F.3d 1329 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003) 2, 8, 12
United States v. *Hodge*, 321 F.3d 429 (3d Cir. 2003) 6
United States v. *Knight*, 342 F.3d 697 (7th Cir. 2003) 15
United States v. *Prigmore*, 243 F.3d 1 (1st Cir. 2001) 15
United States v. *Ramsey*, 406 F.3d 426 (7th cir. 2005) 15
United States v. *Roberts*, 363 F.3d 118 (2d Cir. 2004) 13
United States v. *Souffront*, 338 F.3d 809 (7th Cir. 2003) 15
United States v. *Swan*, 250 F.3d 495 (7th Cir. 2001) 15

Statutes: Page

Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. 813 ..... 2, 4, 10
18 U.S.C. 371 3
21 U.S.C. 331(a) 2
21 U.S.C. 333(a)(2) 2
21 U.S.C. 802(32)(A) 5, 6, 7
21 U.S.C. 813 ..... 2, 4
21 U.S.C. 841 12
21 U.S.C. 841(a)(1) 2, 3, 5, 7, 10
21 U.S.C. 846 ..... 2, 3

Miscellaneous:

65 Fed. Reg. 21, 645 (2000) 8, 11, 12

In the Supreme Court of the United States

No. 05-336

JAMES R. TURCOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 405 F.3d 515. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 39a-45a) is reported at 286 F. Supp. 2d 947.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2004. A petition for rehearing was denied on June 14, 2005 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on September 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing a controlled substance analog with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 813, and of conspiring to possess controlled substances and controlled substance analogues with intent to distribute them, in violation of 21 U.S.C. 846. He was also convicted of conspiring, in violation of 18 U.S.C. 371, to sell misbranded drugs in violation of 21 U.S.C. 331(a) and 333(a)(2). The district court sentenced petitioner to 54 months of imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-36a.

1. Petitioner's convictions arose from his activities with co-defendant Brian Gore involving the sale of products containing the drug Gamma Butyrolacetone (GBL), a substance that converts in the human body to Gamma Hydroxybutyric Acid (GHB), a Schedule I controlled substance.[1] Pet. App. 2a-3a.

In March 2000, petitioner became the owner of Best Buy Supplements, an internet-based company through which he sold Verve 5.0, a purported vitamin supplement that contained GBL. Best Buy Supplements advertised a variety of purported bodybuilding and fitness products, including "Growth Hormone Products"

---

[1] GHB, a Schedule I controlled substance that is known as the "date-rape" drug, is most commonly used as a party drug for its intoxicating or euphoric effects, although some use it believing it to be effective in stimulating muscle growth, promoting sleep, or enhancing libido. *United States* v. *Ellis*, 326 F.3d 550, 552 (4th Cir. 2003); *United States* v. *Fisher*, 289 F.3d 1329, 1331 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003). While it causes a feeling of euphoria, it can also result in dizziness, vomiting, urinary incontinence, seizures, coma, and even death. *Id.* at 1331 & n.2.

such as Verve. A company website advertised Verve as the "absolute finest quality GHB precursor." Another of petitioner's websites acknowledged that ingredients in Verve are "illegal nationwide." Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

To fulfill customer orders, petitioner purchased cases of Verve in which the contents were labeled "cleaning supplies." Pet. App. 3a; Gov't C.A. Br. 4 (citation omitted). One such label stated, "[d]ue to FDA regulations this product is sold as a solvent only." *Id.* at 4-5. A representative of the manufacturer of the GBL in Verve testified at trial that his firm marketed GBL as a chemical solvent to be used as a paint thinner, paint stripper, or for a similar use. *Id.* at 8.

A Drug Enforcemement Agency (DEA) informant arranged for a purchase of Verve from petitioner. Petitioner was arrested after he took $10,000 in cash in a styrofoam cup from the informant in a gas station parking lot and in turn gave the informant 20 cases (60 gallons) of Verve. Pet. App. 3a; Gov't C.A. Br. 5-6.

2. Petitioner was charged in three counts of a five-count indictment. Count One charged petitioner with conspiring to sell misbranded drugs, in violation of 18 U.S.C. 371. Pet. App. 3a, 39a. Count Two charged petitioner with conspiring to possess with intent to distribute mixtures containing GHB and GBL for human consumption, in violation of 21 U.S.C. 846. Pet. App. 3a-4a, 39a. Count Five, arising from petitioner's $10,000 transaction with the DEA informant just preceding his arrest, charged him with possessing with intent to distribute 60 gallons of GHB and GBL for human consumption, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a-4a, 39a-40a. The indictment identified GHB as a schedule I controlled substance, and GBL as a con-

trolled substance analogue.[2] Gov't C.A. Br. 6-7. Under 21 U.S.C. 813, a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813.

The term "controlled substance analogue," with exceptions not relevant here, is defined by statute to mean a substance—

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucino-

---

[2] The indictment also contained allegations relating to 1, 4 Butanediol (BD), but the court of appeals found that BD was not the basis for petitioner's controlled substance convictions and that it was not a factor in petitioner's sentencing. Pet. App. 11a-12a (noting both the government's position that petitioner "was [not] convicted or sentenced for possession or distribution of BD at all," and the statement in the Presentencing Investigation Report that the amounts of substances containing BD were not included in the drug quantity calculation). Petitioner does not raise any claims relating to BD in this Court.

> genic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 802(32)(A).

3. At trial, the district court instructed the jury with respect to the Count Five substantive violation of Section 841(a)(1) that:

> To sustain the charge in Count Five of possessing with intent to distribute mixtures containing a controlled substance, the government must prove the following propositions: First, the defendant knowingly and intentionally possessed mixtures containing GBL; Second, the defendant possessed mixtures containing GBL with the intent to deliver it to another person; and Third, that mixtures containing GBL are an analogue of GHB, a Schedule I Controlled Substance. It does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL.

Gov't Jury Instruction No. 25, at 29; see Pet. App. 13a. Petitioner's convictions on Counts 2 and 5 rested on the evidence and jury findings with respect to GBL as a controlled substance analogue, not GHB.

Petitioner was convicted on all three counts with which he was charged. In addition, the jury returned a special verdict finding that GBL was an analogue of the schedule I controlled substance GHB because all three criteria of the definition were satisfied, to wit: (1) GBL and GHB have substantially similar chemical structures; (2) GBL and GHB have substantially similar effects on the central nervous system; and (3) petitioner represented or intended that GBL and GHB had a substantially similar effect on the central nervous system. Special Verdict Form One. See Pet. App. 8a. The dis-

trict court sentenced petitioner to concurrent sentences of 54 months of imprisonment on each of the three counts on which he was convicted. Pet. App. 6a; Gov't C.A. Br. 12.

3. The court of appeals affirmed. Pet. App. 1a-36a. First, the court agreed with petitioner's argument that satisfying just one of the three criteria in the definition of a controlled substance analogue in 21 U.S.C. 802(32)(A) is not sufficient to satisfy the definition. Disagreeing with the district court, the court of appeals held instead that Section 802(32)(A) should be given a "conjunctive" reading so that, to qualify as a controlled substance analogue, (1) the substance in question must have a chemical structure substantially similar to a controlled substance (criterion one in Section 802(32)(A)); and (2) it must have either a substantially similar effect on the central nervous system (criterion two in Section 802(32)(A)) or be purported or intended to have such an effect (criterion three in Section 802(32)(A)). Pet. App. 6a-10a. The court of appeals noted that its conjunctive reading of Section 802(32)(A) was in accord with the vast majority of federal court decisions. *Id.* at 8a-9a (citing, *e.g.*, *United States* v. *Hodge*, 321 F.3d 429, 433 (3d Cir. 2003)). The court found that the conjunctive reading of Section 802(32)(A) did not benefit petitioner, however, in part because the jury had specifically found by special verdict that GBL met all three criteria in the definition of a controlled substance analogue.[3] Pet. App. 11a.

---

[3] The jury did not find that the substance BD met all the criteria in Section 802(32)(A), but the court of appeals determined that the allegations on BD had no impact on petitioner's sentence. See note 2, *supra*.

The court of appeals next held that, whatever "shortcomings" might exist in the district court's scienter instructions, they did not amount to reversible error. Pet. App. 20a. The court of appeals stated that a conviction under Section 841(a)(1) based on a controlled substance analogue ordinarily requires that "the defendant must know that the substance at issue meets the definition of a controlled substance analogue set forth in [Section] 802(32)(A)." *Id.* at 18a. In the court's view, that meant that "[a] defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects." *Ibid.* The court recognized that "[t]he question of similar chemical structure is particularly nettlesome since, even if such chemical similarities exist, and even if the defendant is aware of these similarities, the intricacies of chemical science may render it extremely difficult to *prove* that a defendant had such knowledge." *Ibid.* But the court concluded that "[a]s a provisional remedy for this problem," a jury should be "permitted—but not required—to infer that the defendant * * * had knowledge of the relevant chemical similarities," *ibid.*, so long as the defendant had been shown to have scienter with respect to the other half of the definition, *i.e.*, so long as the defendant had been shown either to be aware of the similarity between the analogue's physiological/psychological effects and those of a controlled substance or to intend or represent that the analogue had such similar effects. See *ibid.*

Applying that standard to this case, the court noted that the fact that "the jury specifically determined that [petitioner] represented or intended that GBL had

physiological effects similar to GHB * * * suffices to demonstrate scienter with respect to the second prong of the analogue definition (actual or intended similar physiological effect)," but "it is not equivalent to finding *knowledge* of actual chemical similarity." Pet. App. 19a. On that point, the court commented that the evidence at trial was sufficient to support a finding of such knowledge, but that such a finding was not compelled. *Id.* at 20a. The court held, however, that petitioner's conviction nonetheless should not be reversed because "Congress has specifically identified GBL as an analogue of GHB" and "DEA regulations * * * specify that '[GBL] and [GHB] are *structurally and pharmacologically similar to GHB*.'" *Id.* at 20a-21a (quoting 65 Fed. Reg. 21,645 (2000) and citing *United States* v. *Ansaldi*, 372 F.3d 118, 123 (2d Cir. 2004) ("GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue."), cert. denied, 125 S. Ct. 364 and 430 (2004), and *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003) (legislative statements and DEA regulations identify GBL as an analogue of GHB)). The court of appeals concluded that those congressional and regulatory pronouncements were "sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue." Pet. App. 21a. In those circumstances, the court held, petitioner, "having acknowledged that he *knew* he was selling substances containing GBL, * * * cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB." *Id.* at 21a-22a. The court explained that "[a]s with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal sta-

tus," and "[i]gnorance of the relevant legal provisions is no defense." *Id.* at 22a. Accordingly, the court stated, "any error in the district court's scienter instructions [was] harmless." *Ibid.*

ARGUMENT

Petitioner contends that this Court's review is warranted because the court of appeals applied a mistaken harmless-error analysis to the omission of what he contends was a necessary scienter element in the instructions given to the jury. Further review is unwarranted. Although the court of appeals articulated a harmless-error rationale in finding no reversible error, its judgment is correct quite apart from harmless-error principles because it is sufficient to convict a defendant of a controlled substance analogue violation involving GBL that the jury found that the defendant "*knew* he was selling substances containing GBL." Pet. App. 21a. There is no need for this Court to review any purportedly mistaken articulation of harmless-error standards in the opinion. The Seventh Circuit has, on many occasions, demonstrated that it correctly understands the harmless-error test laid down in *Neder* v. *United States*, 527 U.S. 1 (1999), when the jury instructions omit an element of an offense. For the same reason, there is no conflict between the law on harmless error in the Seventh Circuit and the law on harmless error in this and other courts. And because the court's rationale does not appear to turn on a conclusive presumption of knowledge, this Court's mandatory presumption precedents are not implicated.

1. The court of appeals correctly noted that defendants charged with a controlled substance violation ordinarily must be shown to have known that the sub-

stance involved is a controlled substance. Pet. App. 14a. Generally, the defendant's knowledge of the identity of the substance—heroin, cocaine, marijuana, etc. —is sufficient to make that showing. *Id.* at 14a-15a. Thus, in ordinary prosecutions for possessing a controlled substance with intent to distribute it under 21 U.S.C. 841(a)(1), the government need not prove the defendant's knowledge of the precise chemical composition of the substance he possessed.

Under the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. 813, a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." Accordingly, when a defendant is charged with possessing GBL—a controlled substance analogue—with intent to distribute it, the ordinary scienter requirement under Section 841(a)(1) applies. Just as a defendant charged with possessing heroin, cocaine, or marijuana need be shown only to have known the identity of the substance he possessed and need not be shown to have known anything about the chemical composition of that substance, a defendant charged with possessing GBL need be shown only to know that he possessed GBL with the intent that it be used for human consumption and need not be shown to have known anything further about its chemical composition.

Based on that analysis, the jury's verdict contained all of the findings necessary to support petitioner's convictions on Counts 2 and 5. The court of appeals noted that "[t]he jury specifically found that [petitioner] knew the substance he possessed contained GBL." Pet. App.

20a.[4] The jury was instructed that it must find that petitioner "knowingly and intentionally possessed mixtures containing GBL," and that "[i]t does not matter whether the defendant knew the substance was a controlled substance, *only that it was a mixture containing GBL*." Gov't Instruction No. 25, at 29 (emphasis added). In those circumstances, as is the case with heroin, cocaine, marijuana, or other controlled substances, "knowledge of the substance's specific identity implies knowledge of the substance's legal status." Pet. App. 22a. The jury's findings were sufficient to satisfy the statutory scienter requirement.

2. The court of appeals did purport to announce a more general rule that to be convicted of an offense involving a controlled substances analogue, the defendant "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance." Pet. App. 18a. Although the court spoke generally about that questionable knowledge-of-chemical-similarity requirement in controlled substance analogue cases, the court also recognized—as have other courts—that "Congress has specifically identified GBL as an analogue of GHB," and that "DEA regulations also specify" that GBL and GHB are "pharmacologically similar." Pet. App. 20a-21 (quoting 65 Fed. Reg. at 21,645).[5] See *United States* v. *Ansaldi*, 372

---

[4] The court noted that "the jury also found that [petitioner] intended or represented that GBL has similar physiological effects to GHB." Pet. App. 22a n.7.

[5] Petitioner argues (Pet. 16 n.3) that the DEA regulation cited by the court of appeals does not compel the conclusion that GBL is a controlled substance analogue, but only provides that GBL "may satisfy" the definition of a controlled substance analogue "under certain circumstances." *Ibid.* (quoting Pet. App. 21a and 65 Fed. Reg. at 21,645).

F.3d 118, 123 (2d Cir. 2004), cert. denied, 125 S. Ct. 364 and 430 (2004); *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002). In those circumstances, the court agreed with the Second Circuit that "there is one thing [the laws governing controlled substances] make perfectly clear—the sale of GBL for human consumption is illegal." Pet. App. 21a (quoting *Ansaldi*, 372 F.3d at 122). The court concluded that "such pronouncements [from Congress and the DEA] are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue," *ibid.*, and the court accepted that, at least in GBL cases, the scienter required is the same as the scienter required for any other violation of Section 841. See *id.* at 22a ("As with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal status.").[6]

In light of its discussion, the precise breadth of the court of appeals' knowledge-of-chemical-similarity rule is unclear, and the correctness of that rule is not at issue in any event. The court concluded in this case that proof of such knowledge is not necessary in a GBL case.

Those "circumstances" are surely present here, where the drug was being distributed for human consumption and the jury found that petitioner represented or intended that GBL has similar physiological/psychological effects as GHB. With respect to the issue of the similarity of chemical structure between GLB and GHB, the regulation states unequivocally that GBL is "structurally and pharmacologically similar to GHB." Pet. App. 21a (quoting 65 Fed. Reg. at 21,645).

[6] Although the court of appeals later stated that it found any deficiencies in the instructions harmless, see Pet. App. 22a, the court did not explain how, in light of its conclusion that the scienter requirement is the same for GBL offenses as for offenses involving other controlled substances, there was error in the scienter instructions in this case at all.

At the very least, the drug 1,4 butanediol—which was also originally charged in this case under the name "BD," see note 2, *supra*—would appear to be on a par with GBL. See *United States* v. *Roberts*, 363 F.3d 118, 123-124 (2d Cir. 2004). While the court stated that the instructions in this case might constitute reversible error in unspecified other controlled substance analogue prosecutions, this case does not present any question about whether a more stringent scienter requirement or a knowledge-of-chemical-similarity requirement should be applied in cases *not* involving GBL.

3. Petitioner's primary contention is that the "[t]he Seventh Circuit found that the omission from jury instructions of a contested element of the offense constituted harmless error," and that that finding "contradicts opinions of this Court and the law of at least three sister circuits." Pet. 6 (citing, *inter alia*, *Neder* v. *United States*, 527 U.S. 1 (1999)). There is no reason for this Court to review the Seventh Circuit's understanding of *Neder* in this case.

While the court of appeals criticized the jury instructions in this case and purported to rest its decision on the conclusion that "any error" in the instructions was "harmless," see Pet. App. 22a; see also *id.* at 20a ("any deficiencies * * * harmless"), the court ultimately found no reversible error because it concluded that Congress and the DEA had clearly identified GBL as a controlled substance analogue and thus that a defendant's knowledge that a substance is GBL is sufficient to prove scienter. See, *e.g.*, *id.* at 21a-22a ("Thus having acknowledged that he *knew* he was selling substances containing GBL, [petitioner] cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB."); *id.* at 22a ("knowledge

of the substance's specific identity implies knowledge of the substance's legal status"). The court's opinion thus cannot be understood, as petitioner claims, as a general holding that the omission of a seriously contested element from jury instructions can be harmless error. Rather, the court's holding turned on its specific conclusion that, where Congress itself has identified a particular substance as a controlled substance analogue, any deficiencies that existed in the jury instructions on scienter did not amount to reversible error.

If a defendant were required to have actual knowledge that a particular substance had a chemical structure substantially similar to that of a controlled substance in *every* prosecution for a controlled substance analogue, then the fact that Congress had specifically identified GBL as a controlled substance analogue would not constitute conclusive proof that a defendant had actual knowledge of chemical similarity. While there is some ambiguous language in the court's opinion, see Pet. App. 21a, the thrust of the court's analysis appears to be that in a GBL case, no further finding on scienter is required as a matter of law once the defendant is shown to have known that a substance is GBL. *Id.* at 22a. That conclusion does not rest so much on analysis under *Neder* (which the court did not cite) or on the application of a conclusive presumption (which the court did not articulate)[7] as it does on an understanding of the statutory status of GBL in the controlled substance analogues law.

---

[7] Petitioner's attribution (Pet. 15-19) to the court of appeals of having applied such a conclusive presumption is particularly unwarranted because the court elsewhere (Pet. App. 18a-19a n.4) recognized that such presumptions are constitutionally problematic.

Petitioner is mistaken in claiming (Pet. 9) that the instant case conflicts with *Powell* v. *Galaza*, 328 F.3d 558 (9th Cir. 2003), *United States* v. *Prigmore*, 243 F.3d 1 (1st Cir. 2001), or *United States* v. *Brown*, 202 F.3d 691 (4th Cir. 2000). In each of those cases, the court found that there was an instructional error omitting or materially misstating an element of the offense charged and that the error was not harmless in light of the evidence in the case. None of those cases involved the scienter requirements applicable to GBL-based controlled substance analogue prosecutions, and, therefore, they did not involve the unique statutory context involved in this case. Moreover, the Seventh Circuit has elsewhere consistently applied a correct understanding of harmless-error principles.[8] It is thus clear

---

[8] See, *e.g.*, *United States* v. *Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005) (finding omission from jury instructions of element that the defendant must act "knowingly and intentionally" in a prosecution for maintaining a drug house to be harmless under *Neder*; "if the evidence is so strong that a jury would have reached the same verdict absent the erroneous jury instruction, then the error is harmless"), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Knight*, 342 F.3d 697, 712 (7th Cir. 2003) (citing *Neder*, 527 U.S. at 10-11, and finding any alleged error in jury's failure to find foreseeable drug quantity for each defendant harmless under test that asks "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (internal quotation marks omitted); *United States* v. *Souffront*, 338 F.3d 809, 836 (7th Cir. 2003) (finding omission of unanimity instruction on predicate acts in CCE prosecution harmless; "[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless") (quoting *Neder*, 527 U.S. at 17), cert. denied, 540 U.S. 1201 (2004); *United States* v. *Swan*, 250 F.3d 495, 499 (7th Cir. 2001) (finding omission of operation-or-management instruction in RICO prosecution not harmless "[b]ecause

that there is no genuine conflict in the circuits on the meaning of *Neder*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
WILLIAM C. BROWN
Attorney

DECEMBER 2005

---

the record does not contain overwhelming evidence that Swan managed or operated the enterprise," such that it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (quoting *Neder*, 527 US. at 18).

3

Supreme Court, U.S.
FILED
DEC 20 2005
OFFICE OF THE CLERK

No. 05-336

IN THE

Supreme Court of the United States

JAMES R. TURCOTTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 K Street N.W.
Washington, D.C., 20006

JAMES F. HURST
LINDA T. COBERLY
DEREK J. SARAFA
Counsel of Record
SHELBEE L. JAROL
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. THE HARMLESS ERROR ISSUE IS WORTHY OF THIS COURT'S REVIEW	3
A. The Seventh Circuit's Decision Creates A Split of Authority With Regard To The Application Of Harmless Error Analysis When An Element Of The Offense Is Contested	3
B. This Case Is An Appropriate Vehicle By Which To Reach The Harmless Error Issue	6
1. The Ordinary Scienter Requirement Does Not Apply to Analogue Cases	6
2. The Seventh Circuit Announced A General Rule Of Scienter That Applies In All Analogue Cases	8
3. The State Of Petitioner's Knowledge Was Genuinely Contested At Trial	11
II. THE GOVERNMENT FAILS TO CONTEST THE IMPROPRIETY OF A CONCLUSIVE PRESUMPTION ON THE ISSUE OF INTENT	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Apprendi v. New Jersey, 530 U.S. 466 (2000)	13
Fiore v. White, 531 U.S. 225 (2001)	13
In re Winship, 397 U.S. 358 (1970)	13
Neder v. United States, 527 U.S. 1 (1999)	1, 5
Powell v. Galaza, 328 F.3d 558 (9th Cir. 2003)	5
United States v. Brown, 202 F.3d 691 (4th Cir. 2000)	5
United States v. Carlson, 87 F.3d 440 (11th Cir. 1996)	8
United States v. Gaudin, 515 U.S. 506 (1995)	13
United States v. Hussein, 351 F.3d 9 (1st Cir. 2003)	8
United States v. Prigmore, 243 F.3d 1 (1st Cir. 2001)	5
United States v. Roberts, 363 F.3d 118 (2nd Cir. 2004)	8

IN THE

Supreme Court of the United States

No. 05-336

JAMES R. TURCOTTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Remarkably, the Government never confronts the central question presented by the petition—that is, whether the omission of a hotly contested element of an offense from the jury's consideration can ever be harmless. The Government does not deny that the Seventh Circuit's application of harmless error analysis to such an error contravenes this Court's decision in *Neder* and creates a split of authority among the circuits. This Court's intervention is necessary to resolve the split and restore uniformity on this important issue.

Apparently mindful that the Seventh Circuit's harmless error analysis plainly contradicts the authority of this Court,

the Government attempts to recast the issue entirely. Rather than defend the Seventh Circuit's harmless error analysis, the Government contends that the decision below "is correct quite apart from harmless-error principles" on the theory that the omission of the element from the jury's consideration was not error after all. Resp. Br. 9. Thus, the Government suggests that the Seventh Circuit was incorrect on another point as well—the test for scienter in a case involving a controlled substance analogue.

The Seventh Circuit unequivocally found that the "normal" scienter requirement applicable to controlled substances—that is, that knowledge of illegality is presumed and, therefore, mere possession is enough to show scienter—does not apply in analogue cases. Instead, according to the Seventh Circuit (and a majority of courts of appeals that have considered this issue), the defendant must also *know* that the substance in question is a controlled substance analogue. The Government now argues exactly the opposite, claiming, without citation to authority, that the ordinary scienter requirement applies to analogue cases as well as controlled substances cases. This argument is belied not only by the Seventh Circuit's extensive analysis but also by the plain language of the statute and common sense. And in any event, to the extent that there is any doubt about the Seventh Circuit's decision on this issue, it too merits further review by this Court, given the difference of opinion on this issue between the Seventh Circuit and others, on the one hand, and the Eleventh Circuit and the Solicitor General on the other.

The Government addresses the second issue presented in much the same manner. The Government does not, and cannot, contest that the use of a conclusive presumption to satisfy a contested element of a criminal offense contravenes the authority of this Court and, of course, the Fifth and Sixth Amendments. Rather than argue otherwise, the Government simply claims that the Seventh Circuit applied no such pre-

sumption. That is incorrect. Regardless whether the Seventh Circuit used the magic words "conclusive presumption," the court clearly found that the omission of the instruction on scienter (that the defendant must know that the substance was an analogue of a controlled substance) was "harmless" because such knowledge (according to the court) could be presumed from pronouncements that GBL was illegal. Petitioner never had an opportunity to rebut this presumption and thus it was conclusive. The Seventh Circuit's analysis thus contravenes the requirement that a jury decide each contested element of the offense. Given the importance of this issue, and its clear departure from this Court's recent precedents, certiorari on this issue is appropriate as well.

ARGUMENT

I. THE HARMLESS ERROR ISSUE IS WORTHY OF THIS COURT'S REVIEW.

Instead of contesting the merits of the first issue presented, the Government claims first that the court's opinion "cannot be understood, as petitioner claims, as a general holding that the omission of a seriously contested element from jury instructions can be harmless error." Resp. Br. 14. As shown below, this is a flat misreading of the decision. Moreover, the Government has failed in its effort to establish that this case is not a good vehicle with which to address this manifestly important issue.

A. The Seventh Circuit's Decision Creates A Split Of Authority With Regard To The Application Of Harmless Error Analysis When An Element Of The Offense Is Contested.

As a predicate to its harmless error analysis, the Seventh Circuit devoted no fewer than seven pages to explaining why the district court's scienter analysis was in error. Pet. App. 13a-20a. The court ultimately concluded that the instructions should have required a showing "that the defendant knew the

substance in question was a controlled substance analogue." Pet. App. 18a. The jury was specifically instructed to "forego" making that determination, and, thus, according to the Seventh Circuit, the instruction was "incomplete" and "highly misleading." Pet. App. 20a. The court acknowledged that this issue was contested at trial and that it was incapable of weighing contradictory evidence on the topic or making credibility determinations. Pet. App. 20a n.5. Nevertheless, the court found that "given the clear Congressional and regulatory pronouncements of the status of GBL, any error in the district court's scienter instructions were harmless." Pet. App. 22a.

In summary, the Seventh Circuit did exactly what the Government claims it did not do: it squarely held that the omission of the knowledge element from the scienter instruction was harmless error, even though that element was admittedly contested at trial.

The Government makes much of the fact that "the court's holding turned on its specific conclusion that, where Congress itself has identified a particular substance as a controlled substance analogue, any deficiencies that existed in the jury instructions on scienter did not amount to reversible error." Resp. Br. 14. True, the Seventh Circuit's decision that the error was "harmless" was based upon the congressional pronouncements, Pet. App. a, but that is of no moment. The Seventh Circuit's reasoning as to *why* the error was harmless does not change the fact that the court held the error *was* harmless. In other words, the Seventh Circuit could have deemed the error harmless for any number of reasons, but that would not have changed the court's ruling that it is appropriate to find the omission of a genuinely contested element from jury instructions "harmless."

The Government is correct that the appellate court's ruling did not explicitly flout *Neder v. United States*, 527 U.S. 1 (1999), but that is of no consequence. Instances in which

courts of appeals openly disagree with the precedents of this Court are rare. More often, it is the actual decision or judgment of the lower court that unwittingly contradicts this Court's jurisprudence, as is the case here. Regardless whether the appellate court cited or even analyzed *Neder*, its decision contradicts it. *Neder* states that the omission of a contested element from a jury instruction *is not* harmless, and, of course, the Seventh Circuit found that the failure to instruct on scienter *was* harmless, even though the court admitted that the element was genuinely contested.

Remarkably, the Government asks the Court to ignore this contradiction because it contends that the Seventh Circuit has elsewhere "consistently applied a correct understanding of harmless-error principles[,]" citing several cases. Resp. Br. 15. Yet not one of the cases cited by the Government dealt with whether the failure to include a *contested* element in a jury instruction was harmless; in fact, in each of the cited cases, the element was *uncontested*. So while the Seventh Circuit may generally understand harmless error principles, this appears to be the first instance in which the Seventh Circuit has addressed this precise issue—that is, whether the omission of a contested issue from jury instructions can ever be harmless. And, as discussed above, the court's opinion in this case stands squarely for the proposition that it *can* be harmless.

Finally, the Government's only discussion of the three cases[1] that conflict with the Seventh Circuit on the harmless error issue is to say that they did not deal with the statutory context here, without ever explaining why that makes any difference. The particular statutory context is of no consequence; each of those cases held that if jury instructions omit

---

[1] *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001); *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000); *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003).

a contested element of the offense, the error cannot be harmless. Of course, the Seventh Circuit here found to the contrary. For all these reasons, this Court's review of the first issue presented is appropriate.

B. This Case Is An Appropriate Vehicle By Which To Reach The Harmless Error Issue.

The Government next implies that this case does not present an appropriate vehicle for resolving the harmless error issue for three reasons: (i) the error here was not an error at all; (ii) the Seventh Circuit's ruling was limited to GBL cases; and (iii) evidence existed to demonstrate that the Petitioner was aware of the illegality of GBL. As described below, these arguments are without merit, and none should preclude this Court's grant of certiorari on the first issue presented here.

1. The Ordinary Scienter Requirement Does Not Apply to Analogue Cases.

The Seventh Circuit was right to conclude, based upon the applicable statutory context, that knowledge that the substance at issue is an analogue of a controlled substance is required for criminal liability. To the extent there is any dispute about this, however, the issue is independently worth of this Court's review.

The Seventh Circuit found that the district court's instructions as to scienter were "incomplete" and "highly misleading" as to the prerequisites for liability under the Analogue Provision. Pet. App. 20a. The underlying problem was that the instructions applied the ordinary scienter requirement—that is, that knowledge of possession of the substance is enough for criminal culpability and knowledge of the illegality of the substance is presumed—when the instructions should have provided that the defendant must have known that "the substance in question was a controlled substance analogue." Pet. App. 18a.

The Government directly attacks this conclusion, claiming that the result in the case was appropriate because no error occurred. In fact, the Government contends that the "ordinary scienter requirement"—i.e., that the Government need only establish knowledge of the substance's identity—applies to analogue cases as well as controlled substances cases.

But the Government cites no authority to support this proposition. And, in fact, the proposition is directly contradicted by well established authority, the statutory language, and common sense.

As the Seventh Circuit explained, the ordinary scienter requirement, used in cases involving drugs that are "*per se* illegal" such as "cocaine, heroin and the like," is inapplicable in analogue cases. Pet. App. 14a. With drugs such as cocaine and heroin, illegality is fairly implied or presumed. But "[h]ere, and in other analogue cases under § 802(32)(A), the opposite is true—many newly engineered and relatively unknown substances may be involved such that knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance." Pet. App. 15a. The practical import of this distinction is that in cases involving drugs that are *per se* illegal, the Government need only prove possession because knowledge of illegality is fairly presumed, but when the drug is not specifically scheduled and is instead criminalized because it is an analogue of a controlled substance, some knowledge of illegality (for example, that the substance is an *analogue* of a controlled substance) is required. The Seventh Circuit imposed this burden recognizing "that requiring the government to prove scienter as to these criteria may impose a significant prosecutorial burden in some cases." Pet. App. 18a. But that is what the statute requires.

In any case, the issue highlighted by the Solicitor General merely makes certiorari all the more appropriate. In describing the error in the instructions, the Seventh Circuit

acknowledged that there was a split in authority on this issue. Pet. App. 16a.

Specifically, the Seventh Circuit cited the law of the First and Second Circuits as supporting the requirement that the defendant know the substance was an analogue of a controlled substance (or other knowledge of its criminality). Pet. App. 15a (citing *United States v. Hussein*, 351 F.3d 9, 17 (1st Cir. 2003), and noting that in that case the court required that "the defendant [] know both that he possessed Khat *and* that Khat in turn contained the controlled substance cathinone."); Pet. App. 16a (citing *United States v. Roberts*, 363 F.3d 118, 123 n.1 (2d Cir. 2004), and quoting the opinion as stating that the Analogue Act "requires the Government to show that the defendants knew that they possessed a controlled substance"). The court also cited language in an Eleventh Circuit case that arguably supports the Government's position here. The Seventh Circuit quoted *dicta* from *United States v. Carlson*, 87 F.3d 440, 443 n.3 (11th Cir. 1996) as describing "the absence of a scienter requirement in the Analogue Act[.]" Pet. App. 16a. The *dicta* is now supported by the position of the Solicitor General in its brief opposing certiorari in this case.

Thus, the First, Second, and Seventh Circuits are now on one side of the equation, whereas the Eleventh Circuit and the Solicitor General are on the other. In short, the Solicitor General's position supports, rather than undermines, the need for this Court's plenary review.

2. The Seventh Circuit Announced A General Rule Of Scienter That Applies In All Analogue Cases.

The Government also attempts to minimize the import of the Seventh Circuit's opinion by claiming that the scienter rule established in the case is merely applicable to GBL cases. Specifically, the Government contends that "this case

does not present any question about whether a more stringent scienter requirement or a knowledge-of-chemical-similarity requirement should be applied in cases *not* involving GBL." Resp. Br. 13 (emphasis in original). This is untrue for several reasons.

First, the rule established by the Seventh Circuit expressly applies to all analogue cases. The Seventh Circuit stated in unequivocal terms that to sustain a conviction in analogue cases, "[a] defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects." Pet. App. 18a. That is now the law of the Seventh Circuit for all analogue cases.

Second, the Government's claim that the existence of congressional pronouncements moots the need to provide a knowledge instruction in an analogue case involving GBL is misplaced. The Government emphasizes that the Seventh Circuit "agreed with the Second Circuit that 'there is one thing [the laws governing controlled substances] make perfectly clear—the sale of GBL for human consumption is illegal.'" Resp. Br. 12. This statement is both false and irrelevant. Unlike drugs that are *per se* illegal, GBL is not a Schedule I substance. Rather, as the court itself recognized, GBL is criminalized only by virtue of the fact that it is an analogue of a controlled substance. The implication is that "[a] substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial (applying the three clauses of the Analogue Provision)." Pet. App. 16a.

At Petitioner's trial, as at every trial involving an analogue, the Government actually had to prove that GBL was an analogue of GHB, which it attempted to do by presenting expert testimony that the substances were "substantially similar" chemically and in their physiological effects. Tr. at 505-26.

Petitioner countered with his own expert testimony, (Tr. at 1116-54, 1250-54), and, ultimately, the district court instructed the jury that it had to determine whether GBL was in fact an analogue of GHB, (R. Doc. 105), which it did. (R. Doc. 107). But had the jury credited the testimony of Petitioner's experts and found that GBL was not an analogue of GHB (which would have been well within its power to do), then he would have been acquitted on that basis. So for the Government to now say that the illegality of GBL is beyond dispute is, in a word, false.

Of course, had Congress wished to categorically criminalize GBL it could have done so very simply by making it a Schedule I substance. It has not. And until it does, the Government will be put to its proofs to demonstrate that GBL is an analogue of GHB.

Furthermore, whether the congressional pronouncements specifically state that GBL is illegal is simply irrelevant. The Government claims that the congressional pronouncements are sufficient to put a defendant "*on notice* that GBL qualifies as a controlled substance analogue[.]" Resp. Br. 12 (emphasis added). But as explained in the Petition, "[t]he issue of fair notice has nothing to do with whether the Government proved, and the jury decided, that Mr. Turcotte had *knowledge* that the substance he distributed was an analogue of a prohibited substance. Rather, the issue of fair notice pertains to the unrelated issue of whether the statute was unconstitutionally vague." Pet. 16 n.3 (emphasis added). At the very most, the congressional pronouncements would be evidence that Petitioner knew of the substance's illegality but would by no means be conclusive on that point. The Government has never responded to this argument.

3. The State Of Petitioner's Knowledge Was Genuinely Contested At Trial.

The Government rightly does not contest that Petitioner presented ample evidence at trial from which the jury could have concluded, had it been instructed on the issue, that he was not aware that GBL was an analogue of a controlled substance. But in an apparent attempt to influence the Court's decision on certiorari, the Government misleadingly cites portions of the record indicating that company websites claimed that the product was the "absolute finest quality GHB precursor" and that its ingredients were "illegal nationwide." Resp. Br. 3.

As the Government must know from the record and from the explicit references to these websites during oral argument, Petitioner had no involvement in the development or content placement of this website; in fact, he did not even see what appeared on the website. Tr. at 1397, 1414. The site had been set up prior to Petitioner's becoming involved in the business; it was already in operation when he came on board in March 2000, having been set up by a friend of Mr. Brian Gore's (Petitioner's partner) and then managed by Gore himself. Tr. at 1396. Petitioner never admitted to having knowledge of the website content because he had no such knowledge.

What is more, the Government does not contest that Petitioner presented a mountain of evidence from which the jury could have found that he did *not* have knowledge that GBL was an analogue of GHB, including his own sworn testimony, the sworn testimony of a Government agent that Petitioner was "not aware of what the product was," testimony from credible experts that the GBL and GHB were not actually analogues, and more. Pet. 4. To its credit, the Seventh Circuit, though skeptical of some of Petitioner's evidence, admitted that it was incapable of "weighing contradictory evidence and making credibility determinations [which] are

functions generally reserved for the jury[,]" and, accordingly, it refused to "impute the requisite knowledge to Turcotte" based upon the various assertions made on the websites. Pet. App. 20a, n.5.

To be sure, the Government believed at trial and believes now that Petitioner was aware that GBL was a controlled substance analogue, and it presented evidence to that effect. And that is the point: the Government knew and understood its burden and presented evidence to support it, but the issue was never put to the jury as it should have been. Such an error cannot be deemed harmless under this Court's precedent. Accordingly, certiorari is appropriate.

II. THE GOVERNMENT FAILS TO CONTEST THE IMPROPRIETY OF A CONCLUSIVE PRESUMPTION ON THE ISSUE OF INTENT.

As with the first issue presented, the Government does not dispute that, if the Seventh Circuit applied a conclusive presumption that the defendant possessed knowledge that the substance was an analogue of a controlled substance, such a presumption would violate both the Fifth and Sixth Amendments. Instead, in the one sentence of analysis it dedicated to this question, the Government claims the court's decision did not rest "on the application of a conclusive presumption (which the court did not articulate) . . . ." Resp. Br. 14. But while the Seventh Circuit did not acknowledge that it was applying a conclusive presumption to overcome the failure to instruct on scienter, that is precisely what the court did.

Specifically, the court ruled that an instruction stating that the defendant knew the substance was an analogue of a controlled substance is required. Pet. App. 18a. The court also ruled that while the jury may be permitted to use certain inferences to reach a conclusion on the defendant's knowledge, "an avenue should be left open for defendants to refute such an inference." Pet. App. 19a. In other words, the jury

must ultimately decide the issue of whether the defendant had the requisite knowledge, and, as the court itself explained, the jury was instructed to "forego" making that determination. Pet. App. 20a.

Nonetheless, based upon the existence of congressional pronouncements purportedly declaring GBL illegal, the court simply *presumed* that Petitioner had knowledge of its illegality. That this presumption was conclusive is beyond dispute; Petitioner never had the opportunity to rebut this inference which was made by the Seventh Circuit. Had the Government presented this evidence at the trial court—and had the trial court instructed the jury they could make certain inferences but Petitioner had the right to rebut them—that would be an altogether different situation.

This Court's decisions are replete with statements that the Government must prove, beyond a reasonable doubt, each element of the offense with which the defendant is charged. *See, e.g., Fiore v. White*, 531 U.S. 225, 228-29 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358 (1970) (due process requires proof of each element of a criminal offense beyond a reasonable doubt). Here, before Petitioner was convicted, the jury had to decide that the substance was a controlled substance analogue and that Petitioner was aware of that fact. Pet. App. 18a. Instead, the Seventh Circuit simply applied a conclusive presumption based upon the congressional pronouncements, thereby depriving Petitioner of his right to have a jury decide the knowledge element of the offense. The constitutional implications of such a ruling are significant enough to warrant this Court's attention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 K Street N.W.
Washington, D.C., 20006

JAMES F. HURST
LINDA T. COBERLY
DEREK J. SARAFA
Counsel of Record
SHELBEE L. JAROL
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601

Counsel for Petitioner